

(S E R V E D)
(APRIL 2, 1987)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

April 2, 1987

NO. 86-7

THE SECRETARY OF THE ARMY ON BEHALF OF
THE DEPARTMENT OF DEFENSE


v.

THE PORT OF SEATTLE

ERRATA

The following corrections should be made in the Initial Decision in
Docket No. 86-7 which was served on March 31, 1987:

- (1) At page 18, line 8, the year should be "1985" and not "1955."
- (2) At page 29, lines 2 & 3, the words "Rules of Practice and Procedure" should be changed to "regulations involving the Filing of Military Tariffs by Marine Terminal Operators," and
- (3) At page 40, line 10, the word "relevant" should be changed to "relative."


Joseph N. Ingolia
Administrative Law Judge

(FEDERAL MARITIME COMMISSION)
(SERVED MARCH 31, 1987)
(EXCEPTIONS DUE 4-22-87)
(REPLIES TO EXCEPTIONS DUE 5-14-87)

FEDERAL MARITIME COMMISSION

NO. 86-7

THE SECRETARY OF THE ARMY ON BEHALF OF
THE DEPARTMENT OF DEFENSE

v.

THE PORT OF SEATTLE

1. Where a tariff containing a rate for "Direct Transloading" expressly provides that no sorting will be performed, military shipments of flour which do require some sorting, even of a minimal nature, do not come within the ambit of the tariff.
2. Where a military tariff contains one rate for railcar unloading and another rate for ocean container stuffing (vanning), and where the two rates have been applied to military flour shipments for many years and have been paid without complaint by the shipper, it is held that the rate for railcar unloading is not included in the rate for ocean container stuffing. Even though the terms of the tariff are unnecessarily complex and vague, they are not ambiguous as between the parties to this proceeding.
3. Where a military tariff contains one rate for railcar unloading and another rate for container stuffing and where the two operations are physically comparable to the direct transload operation covered by a commercial tariff; and where the differences between the services rendered under each tariff cannot, under the evidence of record, warrant rates more than three times those charged under the commercial tariff, the rates charged under the military tariff which were 5-1/3 times those charged under the commercial tariff are so excessive that they are not reasonably related to the services rendered and constitute an unjust and unreasonable regulation and practice related to or connected with receiving, handling, storing, or delivering property in violation of section 10(d)(1) of the Shipping Act, 1984.

4. Where a military tariff contains one rate for railcar unloading and another rate for container stuffing which operations are physically comparable to a direct transload operation covered by a commercial tariff; and where the rates contained in the military tariff are 5-1/3 times those contained in the commercial tariff; and where the Port issuing the tariffs seeks to justify the disparity by citing "differences" or underlying factors in the movement of military cargo which are either unsupported in the record or are unreasonably related to the benefits derived by the shipper in the railcar unloading and container stuffing operations, it is held that the practice of the Port of assessing charges based upon such underlying factors is itself unreasonable and violates section 10(d)(1) of the Shipping Act, 1984.
5. Where the rates under the military tariff, under the evidence of record, cannot exceed three times those rates which would have been applicable to the flour shipments under the commercial tariff, it is held that the military shipper is entitled to reparations of \$164,263.69, with interest.
6. Where there is no evidence of record that the shipper was aware that it believed it was being overcharged until 1985; and where the military and commercial tariffs are complex, conflicting and vague in many respects, it is held that the shipper is not barred from asserting its claim under the doctrines of laches or equitable estoppel.

Dellon E. Coker, James E. Armstrong, and David A. Carson for the Secretary of the Army on Behalf of the Department of Defense.
Stephen A. Sewell, Carrie Schnelker, John W. Angus, III, and John A. DiVierno for the Port of Seattle.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Preliminary Statement

This case was initiated by a complaint filed by the Secretary of the Army on behalf of the Department of Defense (Complainant) against the Port of Seattle (Respondent) which was served on February 12, 1986. In its Notice of Filing of Complaint and Assignment the Commission stated that the Initial Decision should be issued by February 12, 1987.

¹ This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

It extended that time 45 days to March 30, 1987, to allow the parties to conclude settlement discussions. Unfortunately, those discussions have failed to lead to any basis of settlement.

Initially, it appeared that oral testimony would be necessary and the hearing was scheduled for Seattle, Washington. Ultimately, the parties agreed that oral hearing would not be necessary and each has submitted written testimony and documentary evidence together with a Joint Stipulation of Facts. They also have filed briefs in support of their respective positions. The complaint alleges, in essence, that between the period February 7, 1983, and May 31, 1985, the Army-Air Force Exchange Service, a Department of Defense (DOD) agency, shipped flour through the Port of Seattle (POS) and paid 434 percent more than what commercial shippers would have paid for the same service. It alleges that POS violated sections 10(b)(12) and 10(d)(1) of the Shipping Act of 1984, in that the Respondent "subjected complainant to an undue and unreasonable disadvantage, and failed to establish just and reasonable regulations or practices." The Complainant seeks a cease and desist order, reparations of \$307,615.76 (less any applicable charges for clerking and recovering service), with interest and attorney's fees.

The Respondent, of course, denies all of the above and raises four affirmative defenses, namely that, (1) activities which occurred prior to February 6, 1984, are barred by the statute of limitations, (2) as to reparations for activities occurring prior to June 18, 1984, the Complainant has failed to state a cause of action, (3) the complaint is barred by laches, and (4) the complaint is barred by the doctrine of estoppel.

Findings of Fact

Introductory Statement

As has been noted, the parties have submitted a Joint Stipulation of Facts which has been designated as Exhibit 1-A. Submitted with it are various documents (Schedule A and Annexes A through G). The Joint Stipulation is included in its entirety by reference, as part of this decision. For ease of reference the facts numbered 1 through 21 are set forth below and subsequent findings will continue with Finding of Fact 22. Also for ease of reference exhibits which have been placed into the record of the proceeding are designated as follows:

Complainant's Exhibits

<u>No.</u>	<u>Description</u>
2	Direct Testimony of Allan W. Kirby
3	Direct Testimony of Elizabeth Krasse Pierce
4	Direct Testimony of Richard S. Carlyle
5	Rebuttal Testimony of Richard S. Carlyle
6	Rebuttal Testimony of Robert Alan Pierce
7	Rebuttal Testimony of Alan W. Kirby
8	Reply to Surrebuttal of Robert Alan Pierce

Respondent's Exhibits

<u>Letter</u>	<u>Description</u>
B	Direct Testimony of John H. Loux III
C	Direct Testimony of Elizabeth Prescott
D	Direct Testimony of David LeFebvre
E	Direct Testimony of Jimmie W. Rohrer
F	Surrebuttal Testimony of Jimmie W. Rohrer

Further, it should be noted that at different times and because the reference may be to a document or testimony the Complainant may also be referred to as "DOD," "the Military," or "MTMC." The Respondent may also be referred to as "POS," or "the Port."

Numbered Findings of Fact

It should be pointed out that in this proceeding, on agreement of the parties, it was ordered that each party file written direct and rebuttal testimony and that they file original and, if they desired, reply briefs. By motion filed January 20, 1987, the Respondent filed a Motion to Permit Inclusion of Surrebuttal Testimony in the Record, asking that such testimony given by witness Jimmie Rohrer be allowed because, "one of the rebuttal statements submitted by the complainant was offered by a witness (Robert Pierce) who did not present direct testimony . . .," among other reasons. The Complainant did not object to the inclusion of this further written testimony "because it believes the case should be heard upon as full an evidentiary record as possible." However, it asserted that, "it should be entitled to maintain its right to present closing testimony, limited, of course, to the matters addressed in the Respondent's Surrebuttal Affidavit." The Respondent has filed a lengthy objection to the admission of the latter testimony.

In our discretion, even though it contained more than a response to Pierce's testimony, the surrebuttal testimony of Respondent's witness (Rohrer) was allowed so that the Commission could have as full a record as possible, not because, as Respondent alleged, it was warranted because the Complainant had reserved its witness (Pierce) for rebuttal. We know of no requirement that would have compelled his testimony as direct testimony, and it is possible that it might not have been offered at all had the Respondent's direct case been different. Further, we believe that the response of Complainant's witness (Pierce) is both helpful and necessary to the record insofar as it clarifies and responds

to the testimony of the Complainant's witness (Rohrer). Indeed, we believe the testimony of Robert Alan Pierce is the most trustworthy and credible of any of the testimony presented in this proceeding insofar as it addresses the specific facts involved in the transload operation. He is the person who directed the operation and the only witness who was physically present throughout the handling of the flour shipments involved here.

1. Complainant Secretary of the Army represents the Department of Defense (DOD), which is an executive agency of the United States Government. The Military Traffic Management Command (MTMC) and the Army-Air Force Exchange Services (AAFES) are sub-elements of DOD.

2. At all time relevant hereto, DOD was operating as a shipper of cargo by rail and ocean common carrier in foreign commerce.

3. At all times relevant hereto, Respondent Port of Seattle (POS) was a marine terminal operator at Seattle, Washington, to the extent that it furnished wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. The services in question in this proceeding were provided by Terminal 106W, which was a container freight station operated by POS.

4. For the purposes of the subject Complaint, charges for the complained of terminal service provided by POS for DOD cargo were assessed and billed under the 94 POS invoices set out in Schedule A, attached hereto. Schedule A provides for each individual invoice the number of the invoice; the dates when the invoice was issued, service was performed, and charges were paid; the number of rail cars, pallets, and containers involved; the units and rates used to compute charges; and the amounts billed by POS and sought as reparations by DOD.

5. The complained of terminal service included in the subject 94 invoices was all performed by POS on or subsequent to February 7, 1983, and was all completed by May 31, 1985.

6. The total amount assessed and billed by POS for the complained of terminal service included in the subject 94 invoices was \$375,033.04.

7. The total amount paid by MTMC to POS for the complained of terminal service included in the subject 94 invoices was \$375,033.04.

8. The subject 94 invoices included terminal service provided by POS on:

- a. 210 boxcars containing 10,351 pallets of plastic shrink-wrapped, 100-pound sacks of flour which were placarded as to final port debarkation;

- b. weighing a total of 9,012.17 kilotons;

- c. shipped by AAFES via rail from Pendleton, Oregon, to POS Terminal 106W, Seattle, Washington;

- d. transferred from the rail cars to marine containers by longshoreman agents of POS at Terminal 106W; and

- e. subsequently transferred to vessels of ocean common-carriers for delivery at Inchon, Korea; Yokohama, Japan; Subic, Philippines; and Naha, Okinawa. (The loadings in 152 rail cars were destined to a single port; the loadings in 58 rail cars were destined to multiple ports.)

9. The transfer process performed by POS at Terminal 106W for the subject DOD flour shipments was essentially as follows:

- a. after spotting of the rail cars at the container freight station dock appropriate marine containers were obtained--usually three 20-foot containers or two 40-foot containers for each rail

carload containing a maximum of 60 rectangularly shaped pallets of flour;

b. two forklift trucks and two operators were provided by POS, or its agents, to perform the transfer operation;

c. the forklift operators were provided with written unloading/loading instructions which showed the identification number of each rail car, the number of pallets in each rail car, the port or ports of debarkation for the loadings of each rail car, the identification number of each container and its size, the number of pallets to be stuffed into each container, and the port of debarkation for each container;

d. one forklift operator unloaded one pallet from the rail car and placed the pallet on the dock, and immediately thereafter, a second forklift operator picked up the pallet and placed it in the marine container;

e. for those rail cars containing pallets of flour destined to multiple ports, the second forklift operator read the destination markings on the pallets and transferred such pallets to the container designated for that port;

f. approximately every other pallet was placed in the marine containers from the long side of the pallet to accommodate full utilization of the containers as required by DOD without shoring and blocking the cargo;

g. POS, through its agents, provided clerking service on the DOD flour shipments;

h. POS, through its agents, provided reconditioning/recoopering service on pallets which had shifted in at least

seven rail cars during transit. (Items Nos. 51, 54, and 72, Schedule A.)

10. POS Military Tariff No. 2 was on file with the Federal Maritime Commission during the period February 7, 1983, through May 31, 1985.

11. The charges set out on the subject 94 invoices for the complained of terminal service were assessed, billed, and collected by POS pursuant to Item No. 6 and Item No. 50 of POS Military Tariff No. 2. An example of these two Items and their cover tariff page are attached as Annex A. Item No. 6 published a rate of \$8.87 per metric ton between February 7, 1983, and July 31, 1984, for unloading rail cars. This rate was increased to \$9.85 per metric ton effective August 1, 1984. Item No. 50 published a rate of \$23.09 per cubic meter for stuffing ("vanning") marine containers (subject to a deduction of \$2.47 per cubic meter for unitized cargo, resulting in a net rate of \$20.62 per cubic meter) during the period of the subject Complaint. These two charges were billed to MTMC under two separate invoices for each shipment of flour transferred from rail car to marine containers at Terminal 106W-- one invoice for car unloading services and another invoice for container stuffing service. An example of an invoice for car unloading service and an example of an invoice for container stuffing service are attached as Annex B.

12. The pallets of flour on which charges were assessed for rail car unloading service included in the 28 POS invoices listed in Part I of Schedule A were the identical pallets of flour on which charges were assessed for maine container stuffing service included in the 66 POS invoices listed in Part II of Schedule A.

13. During the period covered by DOD's Complaint, February 7, 1983, through May 31, 1985, POS offered direct transloading service for containerized cargo in a separate tariff. These rates were published in Item No. 4420, "Direct Transloading of Cargo," of POS Terminals Tariff No. 3. An example of this Item and its cover tariff page are attached as Annex C. This tariff was on file with the Federal Maritime Commission during the period February 7, 1983, through May 31, 1985. Item No. 4420 published a rate of \$127.75 per 20-foot container and a rate of \$226.65 per 40-foot container from February 7, 1983, through January 14, 1985. Effective January 15, 1985, these rates were reduced to \$95.00 per 20-foot container, and \$155.00 per 40-foot container. These rates afforded shippers one overall base charge for the transloading service from rail cars to marine containers.

14. During the period covered by the subject complaint, Item No. 4420, POS Terminals Tariff No. 3, stated:

Direct transloading is defined as the transfer of cargo between inland carrier's equipment and ocean carrier's equipment in a single, continuous movement without coming to a place of rest on any dock or platform. No sorting, checking, segregating or breakdown of cargo will be performed under this operation.

15. During the period covered by the subject complaint, Note 6 to Item No. 4420, POS Terminals Tariff No. 3, provided:

When cargo comes to a place of rest on a dock or platform, rates in this item will not apply. Car loading or unloading rates and container stuffing or unstuffing rates as elsewhere published herein apply.

16. During the period covered by the subject complaint, Item No. 1360(F), POS Terminals Tariff No. 3, provided:

Point or place of rest is defined as that area on the terminal facility * * * which is assigned by the terminal for the receipt of outbound cargo from shippers for vessel loading.

An example of this Item and its cover tariff page are attached as Annex D.

17. If the transfer service provided by POS on DOD's 210 carloads of palletized flour shipments (which are included in the 94 subject invoices) had been charged for on the basis of Item No. 4420 of POS Terminals Tariff No. 3, the total cost to DOD would have been \$70,256.45 (plus any additional applicable man-hour charges).

18. POS Military Tariff No. 2, 17th revised page No. 12, effective March 12, 1985, Item No. 50, Note 2, provides that for direct trans-loading of palletized canned foods a charge of \$145.00 per 40-foot container or \$85.00 per 20-foot container may be applied subject to the terms and conditions of Item No. 4420 of POS Terminals Tariff No. 3. Each of these military container rates for palletized canned foods is \$10.00 per container less than the container rates published in Item No. 4420 of POS Terminals Tariff No. 3.

19. During the period covered by the subject Complaint, Item No. 54, Section 2--Container Vanning and Devanning, POS Military Tariff No. 2, under the heading "Scope of Work," provided:

The Port of Seattle will perform receiving, checking and clerking, loading into containers, application of seals/locks to stuffed containers, maintenance of seal/lock register and accountability, and necessary documentation including preparation of transportation control movement documentation, and unloading of inland conveyance at rates and conditions named herein.

The Port of Seattle will unload containers, perform receiving, clerking and checking, segregation by destination, perform

loading of inland conveyance at rates and conditions named herein, and complete delivery documents as may be required.

An example of this Item is attached as Annex E.

20. During part of the period covered by the subject Complaint, shipments of baled cotton were transloaded from rail car to marine container at POS Terminal 106W, and were charged under Item No. 4420 of POS Terminals Tariff No. 3. For that transload service, forklift operators were instructed to load a particular quantity per container, and such operation was included in the transload rates.

21. During late 1985, there was an exchange of correspondence between the Military Traffic Management Command Headquarters, Western Area, and POS concerning the proper charge basis for the terminal service performed by POS on DOD's flour shipments. These two letters dated October 10, 1985, and November 4, 1985, are attached as Annexes F and G.

22. Of the 210 boxcars involved in this suit, 152 were destined for shipment to a single port and 57 were destined for two ports. (Jt. Stip. 8e.) One boxcar load was destined for four ports. (Ex. 4, Para. 9; Ex. 5, Para. 11; and Carlyle Rebut. 11.)

23. A breakdown of the 210 boxcar movements, showing by Invoice Number which were single destination boxcar loads and which were multiple destination boxcar loads, is set out in Schedule A to the parties' Joint Stipulation of Facts. (Ex. 1-A, Schedule A, column d, footnote 1.)

24. Where rail cars were loaded with pallets destined to two foreign ports of debarkation, the pallets were ordinarily segregated by destination behind bulkheads at the opposite ends of the rail cars.

(Ex. 4, Para. 9.) Block stowing was a custom of the trade and random intermingling of multiple destinations would be an exception. (Ex. 5, Para. 11.)

25. The platform, itself, at Terminal 106 West, was not a storage or warehousing area. (Ex. 4, Para. 7.)

26. Although some sorting was involved in moving the flour pallets from the boxcar to the ocean container, the flour pallets, themselves, never had to be broken down for sorting or segregating. (Ex. E, Paras. 25-27; Ex. 4, Para. 9.)

27. The momentary placement of flour pallets on the dock to properly orient them for container stuffing was considered to be a "repositioning" operation so that the pallets could be properly loaded into the container. (Ex. 7, Para. 4; Ex. E, Para. 21; Ex. D, Para. 15.)

28. The employment of two forklift operators to transfer DOD's flour shipments from rail cars to marine containers was an election made by POS to achieve the most efficient and safe operation. One forklift could have been used but it would have taken longer to complete the operation. (Ex. 4, Para. 12; Ex. 5, Para. 12; Ex. E, Para. 28.)

29. Two railroad tracks were located parallel to one side of the loading dock of Terminal 106 West. (Ex. E, attached Ex. 4.) The track closer to the platform was designated track one; the track farther away was designated track two. (Ex. E, Para. 24.)

30. Commercial shipments of aluminum ingots were transferred from rail cars to marine containers at Terminal 106 West on almost a daily basis. (Ex. E, Para. 50.) DOD flour shipments were received at the terminal approximately twice a month; three to four days were required

to transfer the flour pallets from rail cars to marine containers for each group of shipments received. (Ex. 6, Para. 3.)

31. Rail cars containing aluminum ingot shipments were usually spotted on track one because their doors were narrow and they could not be worked on track two through empty rail cars that had contained DOD flour shipments. (Ex. 6, Para. 6.)

32. Rail cars containing DOD flour shipments could be worked on track two through empty rail cars spotted on track one that had contained commercial aluminum shipments. (Ex. 6, Para. 6; Ex. E., Para. 32.)

33. Logistics of the rail lead when spotted to capacity did not enable the switching of rail cars between tracks one and two so as to permit reversing the track position of flour and aluminum rail cars. (Ex. E, Para. 23.)

34. Rail cars containing both flour and aluminum shipments arrived without advance notification to POS only about five to eight percent of the time. (Ex. 6, Para. 8.)

35. A total elapsed time of between two and two and a half hours was required to transfer DOD's flour shipments from a rail car to marine containers--depending largely upon whether the rail car was unloaded from track one or track two. Three or four rail cars of military flour were processed in a day; the record was five. (Ex. 4, Para. 13; Ex. 5, Paras. 15, 16; Ex. 6, Para. 5.)

36. Approximately 25 percent of the time drayage carriers for the steamship lines could not spot to the dock at 106 West marine containers designated for flour shipments because the container side of the dock was already filled with marine containers designated for aluminum ingot

shipments. This preference of commercial aluminum shipments over DOD flour shipments was a business decision of POS. (Ex. 6, Paras. 6, 7.)

37. All-day logs were prepared by longshoremen at Terminal 106 West to record the man-hours expended in the loading and unloading of rail cars and marine containers. The military dock supervisor was responsible for keeping such logs. Such logs were filed with POS, which, in turn, was responsible for sending one copy of the logs to the labor contractor for Terminal 106 West. (Ex. 6, Paras. 2, 9.) The logs showed time per container and total time per rail car. If there was damage or extra handling it was stated on the log along with the number of pallets reboarded. The POS would estimate the additional man-hours by comparing with the average time per car from previous logs. The procedure was worked out by POS personnel and the Military Dock Supervisor years before flour shipments began to move. (Ex. 6, Para. 4; Ex. 8, Para. 4.)

38. Terminal services were performed on commercial shipments of aluminum ingots transferred from rail cars to marine containers at Terminal 106 West at man-hour rates calculated pursuant to Item 6100 of POS Terminals Tariff No. 3, and not under transloading rates published in Item 4420 of that tariff. (Ex. E, Para. 42; Ex. D, Para. 3.)

39. Terminal services were performed on commercial shipments of baled cotton transferred from rail cars to marine containers at Terminal 106 West at the transload rates published in Note 8, Item 4420, POS Terminals Tariff No. 3, which provided that agricultural commodities in excess of 225 kg per individual unit would be rated at \$1.81 per unit. (Ex. 1-A, Para. 20 and Annex C, p. 2 thereto; Ex. E, Para. 42.)

40. Note 8 was a new provision added to Item 4420 of POS Terminals Tariff No. 3 in November 1981 in an attempt to attract a new type of traffic. (Ex. E, Para. 42 and attached Ex. 2, p. 1 thereto.)

41. The transfer of DOD flour shipments from rail cars to marine containers at Terminal 106 West was considered a transload operation by the Military Dock Supervisor, and when longshoremen were sent out to work the flour they were told it was a transload operation. (Ex. G, Para. 12.)

42. During the period in suit, rail car unloading charges assessed by POS under Item 6 of the military tariff for the DOD flour shipments involved totaled \$86,368.29. Van stuffing charges for the same period assessed by POS under Item 50 of the military tariff totaled \$288,664.75. The combined total charges for unloading and loading DOD's flour shipments were \$375,033.04. (Ex. 1-A, Schedule A; Ex. 3, Para. 7.)

43. Effective August 15, 1983, Note 10 was added to Item No. 4420 of the POS Terminal Tariff No. 3. It provides:

At the option of the Director of Marine Services Department, man-hour rates as published in Item 6100 will be used due to circumstances based upon volume, type of cargo and services required.

Complainant's witness--assuming that two hours were required to transfer the loadings of each railcar to marine containers--calculated charges on flour shipments between February 7, 1983, through May 31, 1985, at man-hour rates of \$70,376.79, including \$6,177.59 for reconditioning and reconditioning charges. (Exhibit 3, Paras. 8-13, and Ex. 1 thereto.)

44. Beginning on June 1, 1985, the Respondent began charging DOD for the transferring of flour from rail boxcars to marine containers at

Terminal 106W on the basis of the \$95 and \$150 per-container rates found in Item No. 4420 of POS Terminal Tariff No. 3, plus any other applicable manhour charges. (Ex. 3, Paras. 14, 15.)

45. The transload dock at Terminal 106W is a long narrow platform with rail trucks on one side and a container staging or parking area on the other side of the platform. The platform is a working area for the loading and unloading of freight. It is not a storage or warehouse area. Railcars are spotted on tracks running parallel to one side of the dock. The sea vans are placed on the other side of the transload dock and are aligned perpendicularly to the long axis of the platform and opposite to the boxcars. After the sea vans arrived the terminal contractor hired the two forklift drivers. (Exhibit 4, Para. 7.)

46. During the period involved here there was a military dock supervisor. His time was spent on flour shipments at Terminal 106W approximately twice a month, three to four days each time. The rest of the military dock supervisors' time was spent in receiving military general cargo, loading it into sea vans, and in devanning commercial cargo from Evergreen and Matson Lines. (Exhibit 6, Para. 3.)

47. Effective March 12, 1985, military shipments of palletized canned foods were accorded the benefits of transload Item 4420 of the POS Terminal Tariff No. 3. Item 50 of the POS Military Tariff No. 2, 17th Revised Page No. 12, provided:

Note 2: For direct transloading of palletized canned foods apply \$145.00 per 40 foot container or \$85.00 per 40 foot container. For terms and conditions of transloading see Item 4420, Seattle Terminals Tariff No. 3, FMC-t No. 4.

The rates for canned foods were reduced by \$10 per container from those transloading rates otherwise applicable under Item 4420. The Note 2 would apply to military canned goods moving across Terminal 106W and would apply to Department of Defense shipments moving on pallets the same size as those used in the flour shipments. The shipments would have been subject to the same general military requirements as were the flour shipments. (Ex. 2, Para. 5.)

48. In early 1955, POS personnel became aware that MTMC was dissatisfied with the cost of flour shipments. A meeting was held in April of 1985 where the Port suggested a combination of the existing rate for car unloading and a rate for container stuffing set at the level found in Item 4420. Alternatively, the Port proposed a charge based on man hour rates pursuant to Item 17 of the Military Tariff. MTMC declined the man-hour suggestion and after some negotiation in August of 1985 it accepted a charge based on the transload rate, plus man hours for the additional work required. Soon thereafter, the military filed its overcharge claim and informed the Port that future flour shipments would be source loaded and the Port's services would no longer be required. (Ex. B, Paras. 9, 10; Ex. 3, attached Exs. 4-8; Ex. E. Paras. 16-19.)

49. Unlike the handling of commercial cargo, in the handling of military flour the Port did not control the car and container arrival and spotting. Further, documentation is not handled directly by the Port, but the documentation as well as planning and cargo controls are handled by ILWU personnel. (Ex. B, Paras. 13, 14.)

50. The POS has handled the movement of palletized flour from railroad cars to ocean containers for many years. The movements have

always been rated pursuant to Items 6 and 50 of the Military Tariff and until this proceeding the military has never asserted that the Military Tariff was not applicable to its flour shipments. (Ex. E, Para. 11.)

Ultimate Findings of Fact

51. Since sorting was required in the transloading of military flour and was not included in "Direct Transloading," which is Item No. 4420 of the commercial tariff (POS Terminal Tariff No. 3), the commercial tariff does not apply to the flour shipments.

52. The Military Tariff (POS Military Tariff No. 2) provides two separate rates, one for unloading railcars and another for stuffing containers (vanning) and the latter rate does not include or apply to the unloading of railcars.

53. The rates charged by the POS under the Military Tariff for railcar unloading and stuffing containers, which operation is the same as the transload operation in the commercial tariff with certain allowable differences, are 5-1/3 times the transloading rates charged in the commercial tariff and so excessive that they are not reasonably related to the services rendered and are an unreasonable practice within the meaning of section 10(d)(1) of the Shipping Act of 1984.

54. Many of the "differences" relating to the handling of military shipments which the POS cites as justifying the rates sought in the Military Tariff are not supported by the evidence of record and, even where some of them are supported in the record, they are not and should not be used in setting the rates contained for railcar unloading and vanning in the military tariff.

55. The just and reasonable rates under the Military Tariff cannot under the evidence of record exceed three times the rate charged in the

commercial tariff and the Complainant is entitled to reparations of \$164,263.29, plus interest.

56. The evidence of record does not justify invoking the doctrines of laches or equitable estoppel against the shipper.

Discussion and Conclusions

Before proceeding with this portion of the Initial Decision some clarification of the remaining issues is needed. In its answer to the complaint the Respondent raised four affirmative defenses. Two of them were that:

- (1) . . . Respondent asserts that portion of the complaint which seeks reparations for activities which occurred prior to February 6, 1984, is barred by the statute of limitations,
- (2) . . . Respondent asserts that portion of the complaint which seeks reparations for activities which occurred prior to June 18, 1984, should be barred because Complainant has failed to state a cause of action.

In its original and reply briefs the Respondent did not refer to either of the above issues and it appears it is abandoning them. If it is not we hereby hold that the Complainant is not barred by the statute of limitations for activities occurring before February 6, 1984 and has not failed to state a cause of action for activities occurring prior to June 18, 1984. The Complainant's Trial Brief (pp. 18-22) and its Original Brief (pp. 27-29) clearly and concisely support that holding. In essence Section 21 of the Shipping Act of 1984 provides:

This Act [this chapter, amending sections 801 . . . 815, 816 . . . , 821 . . .] shall become effective 90 days after the date of its enactment [Mar. 20, 1984]. . . .

Under the doctrine espoused in Bradley v. Richmond School Board, 416 U.S. 696 (1974), the Commission has adopted the view that the 1984 Act governs all proceedings pending on its effective date unless such action results in a "manifest injustice." See also Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984 (22 SRR 976, 1984). Here, there is no "manifest injustice" because the operative substantive provisions of the statutes involved are essentially the same. Further, the fact that the statute of limitation is lengthened does not result in a "manifest injustice." For an excellent discussion of the issues see Compagnie Generale Maritime v. S.E.L. Madura (Florida), Inc., 23 SRR, 1085, 1097 (1986), where the complaint was dismissed in settlement (FMC 86-5). See also A & A International v. Kawasaki Kisen Kaisha Ltd., 23 SRR 1174 (1986), where the Commission's decision supports the instant holding.

Issue No. 1 - Affirmative Defenses (Equitable Estoppel, Laches)

While we are dealing with the Respondent's affirmative defenses it is noted there are two defenses it did not abandon, namely:

- (3) . . . Respondent asserts that the complaint is barred by the doctrine of laches.
- (4) . . . Respondent asserts that the complaint is barred by the doctrine of estoppel.

On pages 98 through 104 of its original brief the Respondent seeks to justify the above affirmative defenses. As to laches, it asserts that, "This doctrine provides that unreasonable delay will bar a claim if the delay causes prejudice to the defendant." It then seeks to argue that because the military "insisted on the use of a rate mechanism that did

not include the use of man-hour rates" and because the "rate structure was used for a fifteen year period without complaint by the military," the Port was somehow misled. We think the Respondent's argument is strained and invalid. The record in this case does not even indicate that the military believed or knew it was being overcharged until 1985, much less that it sat on its claim for an unreasonable period of time. It is frivolous for the Port to maintain that it was misled to its detriment by the military's forbearance when all of the facts were known to the Port which, from time to time, made changes in the tariffs, and which was ultimately responsible for what was contained in the tariff.

The same comments are applicable to the issue of equitable estoppel. The Port would have us believe that because the military initiated the military tariff it ought to be estopped from making any claim regarding its application. We cannot agree with such a view. The Respondent asserts the doctrine is applicable where:

(1) plaintiff's words or conduct induced defendant to take some action it would not otherwise have taken; (2) the defendant acted reasonably and relied in good faith on the plaintiff's conduct, and (3) the defendant did not have access to facts contrary to which it relied upon. Organized Fisherman of Florida v. Hovel, 775 F.2d 1544 (11th Cir., 1985), cert denied 106 S.Ct. 2890 (1986); see also Chicago District Council of Carpenters Pension Fund v. Monarch Roofing Co., Inc., 601 F.Supp. 1112 (N.D. Ill., 1984).

Here, the facts do not warrant the application of the doctrine of equitable estoppel against the Complainant. The military negotiated a tariff with the Port, just as other shippers have done and will continue to do. That negotiation did not "induce" the Port to "take some action it would otherwise not have taken." The Port was in control. It published the tariff--not the military, it furnished the facility and it

ultimately decided whether or not to file the rate and take the business. As to having "access to facts contrary to which it relied upon," the testimony of the Port's witnesses demonstrates without question that the Port was in possession of all the pertinent facts relating to the shipments involved. There is no evidence that it unknowingly relied on any facts generated by the Complainant to its detriment. So, here, after reviewing the facts and the case law cited,² we hold that on the merits the facts do not warrant invoking the doctrine of laches or equitable estoppel against the Complainant. Having so held makes it unnecessary to rule on the question of whether or not the doctrine of equitable estoppel and/or laches may be invoked against the United States as a matter of right. However, on the basis of what is contained in the briefs of the parties we believe the case law and the facts of record support the conclusion that those doctrines would not be available against the Complainant here.

Issue No. 2 - Is POS Terminals Tariff No. 3, Item No. 4420 (Commercial Tariff) Applicable to the Military Flour Shipments?

During the period in controversy here, the Port had on file a commercial tariff, the most complete pertinent excerpts of which are set forth in Annex C of Exhibit 1-A. In this proceeding the Complainant asserts that it comes within the ambit of Item 4420 of the tariff which

² We considered discussing each case cited, but after reading them it is our view that to do so is counter-productive. The general statements ascribed to them are correct. However, no real attempt is made to incorporate their holdings into the facts of this proceeding and unless we assume how they are intended to apply (an exercise in which we refuse to join) detailed discussion of the cases is a waste of the Commission's time.

sets rates for "Direct Transloading of Cargo." The tariff states in Section Four, Part 3, Containerized Cargo, Rules and Rates, the following:

Direct transloading is defined as the transfer of cargo between inland carrier's equipment and ocean carrier's equipment in a single, continuous movement without coming to a place of rest on any dock or platform. No sorting, checking, segregating or breakdown of cargo will be performed under this operation. Subject to Notes 1, 2, 3, 4, 5, 6, 8, and 10.

The tariff then sets rates ranging from \$95.00 and \$155.00 per container to \$213.00 and \$396.65 per container depending on the size of the container and whether or not the cargo moved on pallets is easily transferred with rollers or not easily transferred with rollers. Note 6 in the same section of the tariff (Section four) states:

When cargo comes to a place of rest on a dock or platform, rates in this item will not apply. Car loading or unloading rates and container stuffing or unstuffing rates as elsewhere published herein apply.

Section One, Part 2 of the tariff is entitled "Rules, Regulations, and Charges for Miscellaneous Services." Item 1360 is listed under the heading "Definitions and Charges for Miscellaneous Services." It is, in pertinent part, as follows:

Definitions

(D) . . .

(E) . . .

(F) Point of Rest

Point or place of rest is defined as that area on the terminal facility which is assigned by the terminal for the receipt of inbound cargo from the vessel and from which inbound cargo may be delivered to the consignee and that area which is assigned by the terminal for the

receipt of outbound cargo from shippers for vessel loading.

- (1) In respect to the movement of container, point of rest is defined as the place and position designated by ocean carrier for exchanging receipts with and interchange of equipment between vessel and inland carrier or on-dock CFS.
- (1) Addition to definition prescribed in FMC Docket 875, General Order No. 15.

The Complainant urges that Item 4420 of the POS Terminals Tariff No. 3 applies to the military shipments of flour in question here. It argues (1) "DOD's Flour Shipments, for the Most Part, Received No Sorting Service," and (2) "DOD's flour shipments . . . were moved directly across the platform of Terminal 106W from the rail boxcars to the marine containers."

With respect to the factual question of whether or not DOD's flour shipments received sorting service, the evidence of record, including the pertinent portions of the tariffs involved, does not contain a definition of the word "sorting." According to Webster's Third New International Dictionary, p. 2175, to sort is defined as:

sort vb . . . 1: to select as of a certain sort: CHOOSE, also: to distinguish between 2: to assign by or as if by lot; ALLOT 3a: to put in a given place or rank according to kind, class, or nature . . . CLASSIFY--often used with out . . . b: to separate (a particular thing) from a mass.

In the context of the flour shipments involved here we think it clear it means a separation of the pallets into containers according to their destination. The Complainant argues at page 13 of its trial brief that of the 210 boxcarloads . . . 152 required no sorting because the loadings therein were destined to a single overseas port." It asserts that on the 58 remaining boxcars, the loadings were destined to two overseas

ports and that because the pallets had already been segregated by port of debarkation in the boxcars and the pallets were not intermingled (actually 57 boxcars were meant for two destinations and 1 had four destinations (FF 22)). The Complainant then concludes that, "Accordingly, DOD flour shipments for the most part received no sorting service." (Emphasis supplied.) In support of its position it presented the testimony of Mr. Carlyle (Ex. 4, Para. 9) who did not state that the pallets themselves were not sorted but that, "These (flour) pallets never had to be broken down for sorting or segregating." (Emphasis and parenthesis supplied). The witness, Mr. Pierce, states categorically (Ex. 5, Para. 11), that, "Flour was not sorted."

As to whether or not the military flour shipments received sorting services, the Respondent asserts that, ". . . not only was some cargo sorted, but significant sorting services were provided . . . Whether the Commission agrees with the Port that a great deal of sorting was provided, or with DOD, which plays down that service, Item 4420 does not provide that 'some' sorting will be provided. It expressly states that if sorting is required, the item is inapplicable." The Respondent supports its arguments with the testimony of several witnesses. Mr. Rohrer, in incorrectly characterizing Complainant's witness' testimony, testified (Ex. E. Para. 25) that the ILWU supervisor must pre-plan each flour shipment, "in order to enable the lift truck operators to sort and load. . . Constant communication between lift truck operators to correctly sort and store the containers is necessary." Also, Mr. Rohrer (Ex. E. Para. 27), contrary to one of the Complainant's witnesses, testified that, "Frequently, pallets were intermingled throughout the rail car." Also, at page 6 of its Reply Brief the

Respondent cites Mr. Rohrer's testimony for the proposition that, "while one forklift operator could see the destination from the seat of his truck, the second could not, at least for every other pallet . . . Thus, communication between the forklift operators was necessary to perform the operation"; and further, "Each parcel (pallet) of cargo was marked and sorted as to destination. If no sorting were required, the pallets would not need to be worked by destination. However . . . DOD obviously cared whether a given pallet went to Japan, the Philippines or Korea, and if the pallets were not sorted they would not reach their proper destinations."

After review of the above, as well as all the other evidence of record, it is held that the flour shipments involved here did not come under Item 4420 of POS Terminals Tariff No. 3. Given the language and construction of the tariff, there are many aspects of it that are neither clear nor unambiguous. However, the requirement that "No sorting . . . will be performed under this operation" clearly removes the military flour shipments from the application of the tariff. We have found as a fact (FF 26), that the flour shipments did require some sorting and that finding is supported not only by the Respondent's arguments, but in the Complainant's own qualifying statement that the shipments "for the most part" received no sorting service. From the facts it is clear that some sorting took place in the transload operation, and while one might readily agree that it was minimal on a comparative basis, the fact is sorting took place. That being so the Complainant must fail in its attempt to rate the military flour shipments under the Commercial tariff.

Issue No. 3 - Were the Flour Shipments Directly Transloaded and What is the Meaning of the Term, "Place of Rest," and Similar Language?

Insofar as the Complainant and Respondent involved here are concerned, the holding in Issue No. 2, above, makes unnecessary any decision regarding whether or not DOD's flour shipments were moved directly across the platform of the terminal. That issue is only relevant in deciding whether or not Item 4420 of the commercial tariff applies to the flour shipments and we have already held the commercial tariff is inapplicable. However, since the parties have spent considerable time and effort in dealing with the issue and since it does relate to the efficacy of the tariff itself, certain observations are pertinent and may be helpful in the future.

The parties basically agree on the facts. The flour comes into the terminal in boxcars, is removed from the boxcar by one forklift and placed on the terminal floor, is picked up immediately by a second forklift which loads the cargo into the sea van or container. Two forklifts are used by the Port rather than one because every other flour pallet must be "repositioned" so that it can be properly loaded into the container. While one forklift could be used, both parties agree that it would be more costly and less efficient to do so. The Complainant argues that even though the flour is placed on the terminal floor it does not come to a "point or place of rest" within the meaning of the tariff. It argues that the language used in the tariff is "a term of art denoting the point where the terminal operation ends and the

stevedoring operation begins when cargo is to be loaded on ocean vessels.³ The Complainant cites the Commission's Rules of Practice and Procedure (46 CFR § 515.6(c)) which requires the following definition to be included in port terminal tariffs:

. . . "point of rest" means that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargoes from shippers for vessel loading.

Finally, the Complainant notes that the Commission has defined "point of rest" in its decisional process, citing Terminal Rate Structure--California Ports, 3 U.S.M.C. 57, 59 (1948), where the Commission stated that, "the point of rest is the location at which the inbound cargo is deposited and outbound cargo is picked up by the steamship company"; and Terminal Rate Increases--Puget Sound Ports, 3 U.S.M.C. 21, 23-24 (1948), and Rates of Pacific Northwest Elevators Assoc., 11 F.M.C. 372, 389 (1968). The Complainant asserts that in view of the above discussion the "momentary stoppage" of pallets on the terminal platform . . . did not constitute, 'coming to a place of rest on any dock or platform' as those words are used in Item 4420. . . ." In addition to the evidence set forth above, the Complainant offered the testimony of a witness regarding the application of the tariff. Except for the factual portions of the testimony it was rife with gratuitous conclusions advanced as "expert" testimony which was of little help in

³ The complainant cites Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977), and Jacksonville Shipyards Inc. v. Perdue, 539 F.2d 533 (1976), cert. den. 433 U.S. 908, in support of this view.

deciding the issue. (The same is true of the Respondent's "expert" testimony.)

The Respondent's position regarding the interpretation of the language in question is based on the "expert" testimony of Mr. LeFebvre (Respondent's Original Brief, pp. 15, 17-21). It makes the statement that, "Item 4420 is quite clear and precise in its terms, and is in no way ambiguous," and that, "the Port's labor must be able to directly move the cargo from an inland carrier's equipment and transfer it in a 'single continuous movement' to an ocean carrier's equipment." It cites the "place of rest on any dock or platform," language used in Item 4420 contained in Section Four, Part 3 of the commercial tariff as well as the similar language in Note 6 of the same section of the tariff. The Respondent also adopts the "expert" view of Mr. LeFebvre that the definition of "point of rest" in Item 1360 in Part 2 of Section One of the terminal's tariff, which it alleges is relied upon by the Respondent, is "clearly not applicable to operations governed by Section Four of the Terminal's Tariff" (the commercial tariff). It proceeds to place emphasis on the literal meaning of various phrases like "single, continuous movement" and "place of rest" as opposed to "point of rest." Insofar as we can ascertain, it never fully discusses or deals with the use of the "point of rest" language as a term of the art except to note that "other northwest ports use the term in the same way as does POS" and to ask rhetorically, "Would it make sense for all these ports to put language in their tariffs governing CFS operation which is meaningless?" (Respondent's Reply Brief, pp. 25-27.)

In our view, any resolution of this issue must begin with the Commission's definition of the phrase "point of rest." It is set forth

in the regulations clearly and concisely and is required to be used in pertinent tariffs. It is used in the Respondent's commercial tariff before us. Yet, the Respondent urges that even though it means what the Commission says it means in one section, the same or similar language in other sections of the tariff means something different. We have read the different sections of the tariff and have attempted to interpret the tariff language. The assertion that the tariff is clear and unambiguous is in the realm of linguistic fantasy. The conflicting tariff language creates a whole series of questions and anomalous situations. For example, both of the parties have noted the absurdity of applying the tariff in either of two conflicting ways (e.g., one leads to the treatment of the entire CFS station as a "point of rest"; in another example, the tariff can be construed as holding both the carrier and shipper liable for the same charges) and amazingly the tariff language would allow them both to be right.

Without belaboring the point, we would suggest to the Respondent that, at best, the portions of the tariff having to do with the phrases "point of rest" or "place of rest" or "continuous movement without coming to a place of rest on any dock or platform" or "point or place of rest" must begin with the Commission's definition as set forth in the regulation (516.6(c)). In addition to the definition in question, other definitions are provided in subparagraph (d) of the regulation and subparagraph (a) would allow "other definitions if they are correlated by footnote or other appropriate method to the definitions set forth in subparagraph (d)." Since the Commission definition of "point of rest" is in subparagraph (c), this seems to infer, and it can legally be argued that the definition in question may not be altered and "other

definitions" may not be used. Therefore, it would appear wise to use the words "point of rest" and any similar or related phrases in the same manner as does the Commission throughout a tariff. If any other meaning is used then the tariff would risk being found to be ambiguous, or even worse, partially invalid. Clearly, unless one was bent on creating ambiguity, absent different language, one ought to at least use qualifying language in the tariff. For example, in Section 4, Part 3 of the commercial tariff before us, a footnote properly placed could have clearly stated, "the term 'single, continuous, movement without coming to a place of rest on any dock or platform' is to be read literally and has a different meaning than the term, 'point of rest,' which is used in Section One, Part Two."

So Here, we would suggest that whatever the final outcome of this proceeding, the Respondent undertake to clarify the ambiguities in its commercial tariff regarding the definition of "point of rest." The fact that other ports may have tariff's with similar language, as the Respondent points out, is of interest, but the record does not indicate how that language is ultimately applied, which is, after all, the important consideration. If it is applied as the Respondent here applies it, clarification would be in order in those other tariffs.

Before moving from the question of whether or not the commercial tariff covers the flour shipments, it is noted that the Respondent asserts that another reason it is not applicable is because Item 4200(A) of the tariff expressly provides that rates in Item 4420 will not apply unless the cargo is booked with the ocean carrier before it is delivered to the CFS, and military cargo (flour) is not booked until after it arrives (Respondent's Original Brief, pp. 66-67, 69, citing the

testimony of witness Rohrer (Ex. E, Para. 10)). The Complainant rebuts that premise (Complainant's Reply Brief, pp. 2-6) and concludes that, "the advance booking provisions of Item 4200(A) are restricted in application to Container Freight Stations rates published in Part 2 and do not spill over into Transload Station rates published in Item 4420 of Part 3, Section Four." We agree. In so doing, we would again note that a reading of the supporting testimony and the legal analysis of the pertinent tariff provisions emphasize, once again, the unnecessary complexity and ambiguity of the commercial tariff. But for our holding as to the sorting issue, we would have resolved this ambiguity as well as others in the tariff (i.e., "point of rest," etc.) against the Respondent and, again, we would suggest that clarification and revision are in order.

Issue No. 4 - Was the Terminal Service Performed by POS on DOD's Flour Shipments Chargeable Solely Under Item No. 50 of POS Military Tariff No. 2?

At page 14 of its Trial Brief and in portions of its Original and Reply Briefs, the Complainant makes the alternative argument that it was charged twice for the same service under the Military Tariff. Citing the testimony of its "tariff expert," it notes that it was charged under Item No. 6 of the tariff for rail boxcar unloading and under Item No. 50 for marine container stuffing (vanning) and alleges that both services were included under Item 50 of the tariff. The crux of its argument is based on a consideration of Item No. 54 of the tariff in conjunction with other pertinent sections. Item 54, entitled "Scope of Work," reads:

The Port of Seattle will perform receiving, checking and clerking, loading into containers, application of seals/locks to stuffed containers, maintenance of seal/lock register and accountability, and necessary documentation including preparation of transportation control movement documentation, and [unloading of inland conveyance at rates and conditions named herein]. (Brackets supplied.)

The Complainant alleges that the bracketed portion of the above statement, when read in conjunction with Item 50 and Item 35, and in considering the "overall structure and layout of the military tariff," leads to the inescapable conclusion, "the words of Item No. 54 (Special Rules)" (bracketed above), "mean that rail boxcar unloading service is included in the rates set out in Item No. 50 of Section 2." The Complainant alleges the excess "double charging" amounted to \$86,368.04.

Of course, the Respondent disagrees with all of the above. Citing its "tariff expert" it alleges that "contrary to DOD's allegedly 'inescapable' conclusion, the Port submits that these rules clearly indicate separate charges for unloading railcars and stuffing containers. Item 60 states that the stuffing rate is 'subject to' among other rules, Item 35, which in turn defines car unloading as a separate charge, clearly establishing that unloading is additional."

It is held that, after consideration of all of the pertinent provisions of the Military Tariff, it provides separate rates for boxcar unloading and container vanning (stuffing) and devanning. While the terms of the tariff were unnecessary complex and not as clear as they might be as between the parties in this proceeding, they were not ambiguous. The tariff rates were applied and paid over a period of many years and both parties understood and acted on the basis of the two separate rates.

Issue No. 5 - Did POS Fail to Establish, Observe, and Enforce Just and Reasonable Practices in the Receiving, Handling, and Delivering of DOD's Flour Shipments in Violation of Section 10(d)(1) of the Shipping Act, 1984?

Section 10(d)(1) of the Shipping Act of 1984 provides that:

No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering of property.

The above section is the successor to section 17 of the Shipping Act, 1916, and is basically unchanged.

The Complainant alleges that it is entitled to reparations because POS violated section 10(d)(1) by (1) applying Military Tariff No. 2 instead of Terminals Tariff No. 3 to the flour shipments and by (2) charging a rate under the Military Tariff over 434 percent higher than that applicable under the commercial tariff for the same or similar services. We have already concluded that the POS Terminal Tariff No. 3 (the commercial tariff) does not apply to the flour shipments so that Complainant's first position on this issue must be rejected.

As to the Complainant's second argument it states at page 26 of its Trial Brief:

Under the Examiner's reasoning in Pittston (Pittston Stevedoring Corp. v. New Haven Terminal, Inc., 11 SRR 57 (1969)), as adopted by the Commission, the application of Military Tariff No. 2 by POS to DOD's shipments was an unjust and unreasonable practice in violation of 10(d)(1) of the 1984 Act. Because, as shown above, when one compares the services rendered by POS to DOD under Military Tariff No. 2 as compared to the services rendered by POS to commercial shippers under Terminals Tariff No. 3, and then compares the difference in charges under each, one easily concludes that Military Tariff No. 2 was excessive as applied to DOD . . . the unloading and loading charges assessed DOD were clearly excessive because

they could not have borne a reasonable relationship to the services rendered. . . .

Beginning at page 94 of the Original Brief the Respondent argues that its application of Military Tariff Items 6 and 50 does not violate section 10(d)(1) of the Shipping Act of 1984. It asserts that the case law cited by the Complainant is "inapposite to the facts of this case," and states:

Further, to the extent DOD's Section 10(d)(1) argument is simply a naked claim that it is not receiving the same rates for the same service, the Port has already shown . . . that DOD's characterization of the facts is erroneous. As discussed above, the difference in transportation conditions between commercial cotton, the only commodity ever rated under Item 4420, and military flour shipments . . . are very substantial, due to the nature of the commodities concerned and the differences between military and commercial shipments.

In its reply brief (pp. 34-39), the Respondent combines its arguments relating to section 10(b)(12) and 10(d)(1), respectively, of the Shipping Act of 1984, which is the source of some confusion. If we understand correctly, as to section 10(d)(1) its argument is that in addition to ignoring the differences in the services provided for flour shipments and those available under Item 4420, the Complainant has not established that any disparity in rates was not unjustified in light of transportation conditions.

It is well settled that the proper inquiry under section 10(d)(1) is whether or not the charge levied is reasonably related to the service rendered. Volkswagenwerk Aktiengesellschaft v. F.M.C. (Volkswagen), 390 U.S. 261, 282, reversing and remanding 371 F.2d 747, which aff'd 9 F.M.C. 77. Further, under Volkswagen the question of reasonableness does not depend upon unlawful or discriminatory intent. It is a

question of fact which, as this case demonstrates, may be extremely difficult and complicated. Further, as used in section 10(d)(1), "just and reasonable regulations and practices" means regulations and practices, otherwise lawful but not excessive and which are fit and appropriate to the end in view." Investigation of Free Time Practices--Port of San Diego, 9 F.M.C. 525, 547 (1966).

Of course, one could cite numerous other cases espousing general guidelines--none of which, standing alone, would be very helpful. The real question on this issue is twofold; what did POS provide the military (DOD) under the military tariff and what did the military pay for it? As to what POS provided it unloaded boxcars and loaded containers. A reading of the military tariff (the most complete copy of which is attached to Mr. LeFebvre's testimony (Ex. D, attached Ex. 2)) discloses that the boxcar unloading rules and rates as well as those applying to vanning and devanning were quite precise and narrow and the tariff contains many additional detailed rules and regulations relating to wharfage, handling, direct transfers, labor. In addition, the responsibilities of the POS are set down quite precisely. As to what the DOD paid for the services, the actual charges for railcar unloading and vanning are set forth fully in Schedule A to the Stipulation of Facts. The charges for railcar unloading for the pertinent time period involved were \$86,368.29. The charges for vanning (marine container stuffing) were \$288,664.75, amounting to a total for both operations of \$375,033.04.

As has been noted, the Complainant urges that boxcar unloading and vanning under the military tariff are the same as or similar to the transload operation under the commercial tariff. It notes, that had it

been charged under the rates in the commercial tariff the total charges would have been \$70,256.45 and it would have been entitled to reparations of \$304,776.59. The Respondent, on the other hand, asserts that there are tremendous differences between military flour shipments and the shipments moving under Item 4420 of the commercial tariff, noting and comparing the cotton shipments that move under Item 4420. It discusses the differences continually throughout its arguments and lists 19 of them at pages 73 and 74 of its original brief.

In our view, the facts of record in this proceeding establish conclusively that the rates charged the Complainant under the military tariff are so excessive that they are not reasonably related to the services rendered and constitute an unreasonable practice related to or connected with the receiving, handling, storing or delivering of property. First of all, standing alone, the physical act of unloading a boxcar and stuffing a container under the military tariff is the same as the physical act of transloading under the commercial tariff. Once one looks past the act itself, certainly, consideration and comparison of the nature of the cargo is in order. However, those comparisons need to be made in the light of the service rendered in the tariff. Here, other than minimal sorting and the need to use two forklifts to reposition the pallets, there is little real difference between the transload of the commercial tariff and the unloading and stuffing covered in the military tariff. As to the 19 differences noted by the Respondent, there is little definitive evidence in the record to support many of them and practically no evidence relating to the specific shipments in issue. Further, even if the evidence did demonstrate there were differences and they were due to military requirements and not to the Port's own

internal procedures, most of them either do not or should not be related to the service provided. For example, whether one were dealing with the transload service provided under the commercial tariff or the unloading and vanning of the military tariff, there would be no reason and no practical way to adjust those rates because, generally, "military cargo required a special segregated storage area for its use only" or because "coordination with various government branches is necessary for military shipments." These and some other of the 19 differences are vague and inapplicable, but even if they were germane to the tariff they would seem to be more properly the subject of other charges and ought not to be subsumed into the transload rate or the railcar unloading and vanning rate, to be adjusted and applied as the POS sees fit. Such conduct is itself an unjust and unreasonable practice under section 10(d)(1), because it thwarts rather than aids the Commission in carrying out its responsibilities in keeping properly informed of the rates and charges instituted by the POS, and does not adequately inform the public of its practices. As was noted in Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 18 F.M.C. 140, 161 (1975), aff'd 530 F.2d 1036:

If any one or all underlying factors used to determine the charge are found to be unreasonably related to the benefits derived . . . the practice of assessing charges based upon those factors is itself unreasonable.

In addition to the above, we believe the facts of record establish that the alleged differences between the military flour shipments and the movements covered by the commercial tariff are overstated even if technically true. The record establishes that the POS in late 1985 agreed to handle government canned goods at rates 10 percent less than those then set forth in Item 4420 of the commercial tariff. Even

admitting that POS did so believing the canned goods could be trans-loaded with one forklift in a continuous movement (which assertion differs from the testimony of the Complainant's witnesses), the remaining "differences" relating to the military shipments would still be present. The fact that POS was willing to lower the rate in the commercial tariff to accommodate military canned goods (FF 47) indicates quite clearly that the military requirements or "differences" were not really a material factor in establishing the rate. Other facts which militate against the Respondent's allegations are that, (1) because of the frequency of other commercial shipments and the relevant infrequency of military flour shipments, the POS gave preference to the commercial shipments (FF 36); (2) the problems cited regarding the spotting on tracks 1 or 2 of the terminal are due more to the Port itself than to the nature of the military shipments (Ex. 6, Paras. 6, 7, 11); (3) the Port's continued comparison of flour shipments with aluminum shipments are not pertinent. The facts show that aluminum was charged under a man-hour rate and not under Item 4420 of the commercial tariff. As the Complainant points out at page 18 of its Original Brief, aluminum shipments "were charged for (under some unspecified basis or authority) at man hour rates set out in Item 6100 of Terminals Tariff No. 3." (FF 41).⁴ As a result aluminum was able to avoid the higher trans-loading rates in Item 4420; (4) The Port's comparison of cotton

⁴ It is interesting to note that Note 10 of the commercial tariff allows the Port's Director of Marine Services Department the option of applying man-hour rates "due to circumstances based on volume, type of cargo and services required." In addition to being ambiguous the practice, which allows the application of two rates for the same service, is questionable, if not invalid.

shipments to the flour shipments is valid in the sense that cotton shipments are being compared to flour shipments respecting the application of Item 4420 of the commercial tariff. However, the Port's continual assertion that cotton is the only cargo moving under Item 4420 does not help its case. When Item 4420 was first published on March 1, 1981, cotton was not included. Note 8 was added on November 23, 1981, and provided that agricultural commodities of 225 kg per individual unit will be rated at 1.81 per unit rather than on a per-container basis, with varying rates, dependent upon whether lift trucks or rollers were used. This allowed cotton to have the lower rate which was not contemplated in the original publication of Item 4420.⁵

So here, we think that under the facts of this case, the Respondent cannot justify a rate of \$1,785.87 per transfer (unloading railcar, loading container) under the military tariff when it has a transload rate in a commercial tariff of \$334.55 per transfer. We agree with its witness Rohrer that the flour shipments "were in excess of our normal markup to cover expense and profit." (Ex. 3, attached Ex. 5, p. 1.)⁶

Issue No. 5 - What Reparations Are Due the Complainant?

Having decided that the rates charged the Complainant were unjust and unreasonable under section 10(d)(1) of the Shipping Act, 1984, it

⁵ See pp. 17-20 for a more detailed discussion of the treatment of the aluminum and cotton shipments.

⁶ See pp. 15 and 16 of the Complainant's Reply Brief for further discussion.

remains to determine the amount of reparations. In considering the question it is apparent to this writer that the parties themselves have already reached the correct criteria. The facts indicate that when the military raised the question of overcharging for the services provided it, the Port and the military attempted to negotiate a mutually satisfactory rate. Beginning on June 1, 1985, the Respondent began charging DOD for the transferring of flour from rail boxcars to marine containers at Terminal 106W on the basis of the per container rates found in Item No. 4420 of the commercial tariff, plus any other applicable manhour charges (FF 44). We believe that would have been the correct rate to charge for the shipments involved in this proceeding. In so stating we note that both parties assert that man-hour records are not available that would allow a proper computation. However, given Mr. Pierce's testimony (FF 37), we believe that a little intelligent effort would produce a satisfactory result, and but for the time limitations involved, the undersigned would have required the parties to provide additional facts in this area. The Commission may still wish to have them do so in its review of this decision.

On the basis of the present state of the record and based on Mr. Pierce's testimony that a flour shipment transload would take from 2 to 2½ hours, and making allowances for the pertinent differences between flour shipments and shipments moving under Item 4420 of the commercial tariff, it is held that the outside limit of the reasonable cost for the unloading of flour pallets from railcars and stuffing them into an ocean container was no more than three times the transload rate that was contained in the commercial tariff. Consequently, it is held that the Respondent pay reparations to the Complainant of \$164,263.69

plus interest computed in accordance with the Commission's rules and regulations. (46 CFR 502.253(a).)

Since it has been decided that the Respondent has violated section 10(d)(1) of the Shipping Act, 1984, and that, as a result, reparations are due the Complainant, it is not necessary to decide whether or not section 10(b)(12) of the Shipping Act, 1984 (formerly section 16, of the Shipping Act, 1916) has been violated. The parties make extensive arguments regarding this issue in their briefs. While, as has been noted, no decision is made regarding violation of section 10(b)(12), one brief clarifying comment is warranted regarding the need for a competitive relationship between a complainant and another shipper. In our view, under the tariffs involved in this proceeding, DOD was in competition with other shippers for the use of the CFS transload facilities. Any showing that the Port preferred other shippers using the facilities over DOD would be sufficient to bring that activity within the purview of section 10(b)(12). It would not be necessary to find another shipper who was competing for military flour shipments before section 10(b)(12) would be applicable.

Miscellaneous Considerations

The nature of this case and the manner in which various facts and arguments were interspersed throughout the evidentiary record and the briefs, makes appropriate the discussion of miscellaneous considerations which are set forth below:

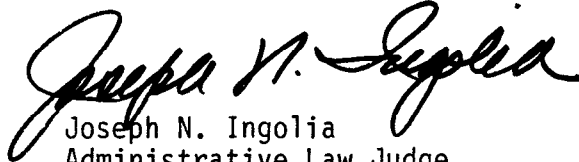
(1) In its argument at page 14 of its Trial Brief the Complainant urges that Item 6100 of the commercial tariff allows for man-hour supplemental charges for regular sorting service. We do not believe the

page of the tariff containing Item 6100 is in the record and in any event a reading of the pertinent tariff page indicates that the only exception for the use of man hour rates is contained in Note 4 and relates to checking. It does not include sorting.

(2) Throughout its submissions the Port cites its dealings with the military, its willingness to adjust and negotiate rates and the fact that the military tariff allows either party to "amend or cancel" the tariff upon "giving 30 days written notice to interested party." Further, it allows the tariff to be amended by any party on 7 days written notice if the amendment is agreed to by both parties. Further, at page 22 of its Reply Brief the Port talks about placing "blame" for what may have occurred. All of the above, in our view, is "makeweight" argument. The statutes and the Commission look to the Port as the responsible party in the filing and application of its tariffs. The Port cannot avoid that responsibility. It is not a question of who is to blame, but rather, under the law, who is responsible for what is contained in the tariff and for any violations that occur. The provisions in the tariff dealing with amendments and cancellation by either part on notice are, in our view, of no legal significance. Further, the fact that DOD initiated the tariff and negotiated changes to it with the Port is of no consequence in this proceeding. Finally, with respect to the Port's statements justifying competition, it is, of course, right, proper and necessary for the Port, as well as any other business entity, to recognize and seek competitive advantage. In doing so, however, it cannot violate the provisions of the Shipping Act, as it has done here.

Finally, it is noted that the Complainant seeks an award for attorney's fees in this proceeding. We direct the Complainant's

attention to Docket No. 86-27, Attorney's Fees in Reparations Proceedings, served on February 26, 1987, which promulgates a final rule (46 CFR 502.254), setting forth the procedures to be followed in claiming attorney's fees in reparation proceedings.


Joseph N. Ingolia
Administrative Law Judge

Washington, D.C.
March 30, 1987

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-7

THE SECRETARY OF THE ARMY ON BEHALF
OF THE DEPARTMENT OF DEFENSE v.
THE PORT OF SEATTLE

ORDER ADOPTING IN PART, REVERSING IN PART,
AND SUPPLEMENTING THE INITIAL DECISION

This proceeding was initiated by a complaint filed by the Secretary of the Army on behalf of the Department of Defense ("Complainant" or "DOD") alleging that the Port of Seattle ("Respondent", "Port" or "POS") had violated sections 10(b)(12) and 10(d)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§ 1709(b)(12) and 1709(d)(1). The complaint charged that Respondent had subjected Complainant to undue and unreasonable disadvantage and failed to establish just and reasonable practices, respectively, by charging DOD 434 percent more than commercial shippers would have paid for the same services in connection with shipments of flour during the period February 7, 1983 through May 31, 1985. Complainant sought reparations of approximately \$300,000 plus interest and attorney's fees.

The case was submitted on written testimony, documentary evidence, a joint stipulation of facts, and briefs. The proceeding is before the Commission on Exceptions to the Initial Decision ("I.D.") of Administrative Law Judge Joseph N. Ingolia ("Presiding

Officer"). The I.D. found that POS had violated section 10(d)(1) and awarded reparations of \$164,263.29 plus interest. Complainant and Respondent filed Exceptions and Replies to Exceptions. Oral argument was heard.

BACKGROUND

The Department of Defense, through its sub-agency, the Military Traffic Management Command, shipped 210 boxcarloads of flour on behalf of another DOD sub-agency -- the Army-Air Force Exchange Services -- through the Port of Seattle during the 28-month period in question. The flour was shipped by rail from Pendleton, Oregon to POS terminal 106W in 100-pound sacks, plastic shrink-wrapped, on pallets with a maximum of 60 pallets to a boxcar. Each of the 10,351 pallets was marked as to final destination. Of the 210 boxcars, 152 contained flour for a single destination, 57 boxcars contained cargo marked for two destinations, and one boxcar held cargo destined for four different ports of debarkation.

At POS terminal 106W, the pallets were transferred by longshoremen acting for POS from the boxcars to marine containers, then loaded on vessels for delivery to Inchon, Korea; Yokohama, Japan; Subic Bay, Philippines; and Naha, Okinawa. The contents of a single boxcar were transferred to three 20-foot or two 40-foot containers.

The rail cars were spotted at one side of the container freight station ("CFS") dock; appropriate marine containers

were obtained from the ocean carriers and spotted at the other side of the CFS dock at Terminal 106W. Two forklift trucks and two operators, provided by the Port or its agents, transferred the cargo according to written instructions which identified each railcar by number and port or ports of debarkation; the number, size, and port of debarkation of each container; and the number of pallets in each car and the number to be stuffed into each container. One forklift operator unloaded a pallet from the railcar and placed it on the dock where it was immediately picked up and placed in the marine container by the second forklift operator. Every other pallet, approximately, was turned for proper positioning in the container, to maximize container utilization.

During the relevant period, the Port had on file at the Commission a commercial tariff, Terminal Tariff No. 3 ("Commercial Tariff"), as well as Military Tariff No. 2 ("Military Tariff"). The DOD flour shipments were charged a total of \$375,033 for unloading rail cars (Item No. 6) and stuffing or "vanning" containers (Item No. 50), both under the Military Tariff. Item No. 6 of the Military Tariff specified a rate of \$8.87 (effective during most of this period; later increased to \$9.85) per metric ton for unloading or loading flour in sacks from or into railcars. Item No. 50 of that tariff established a rate of \$28.79 per metric ton for container vanning and devanning of "freight all kinds, NOS." These separate charges were billed under

two separate invoices for each shipment, on a total 94 invoices.

At the same time, Item No. 4420 of POS Terminal Tariff No. 3, the Commercial Tariff, reflected a single per-container rate for direct transloading of palletized cargo between rail cars and marine containers. This item stated:

Direct transloading is defined as the transfer of cargo between inland carrier's equipment and ocean carrier's equipment in a single, continuous movement without coming to a place of rest on any dock or platform. No sorting, checking, segregating or breakdown of cargo will be performed under this operation.

Note 6 to this item provided:

When cargo comes to a place of rest on a dock or platform, rates in this item will not apply. Car loading or unloading rates and container stuffing or unstuffing rates as elsewhere published herein apply.

Elsewhere in the Commercial Tariff at Item No. 1360(F), "point or place of rest is defined as that area on the terminal facility . . . which is assigned by the terminal for the receipt of outbound cargo from shippers for vessel loading."

If these per container rates for transloading had been charged for the DOD flour shipments, the total cost to DOD would have been \$70,256, plus any additional applicable man-hour charges, including those for reconditioning or re-coopering of damaged pallets.

The parties agreed below that the only cargo which has ever been transferred at POS Terminal 106W under Item No. 4420 of the Commercial Tariff was baled cotton in

boxcarloads. The record also shows that aluminum ingots were transferred directly from boxcars to marine containers at Terminal 106W, but were charged on a man-hour basis under Item No. 6100 rather than Item No. 4420.¹

A. The Initial Decision

The Presiding Officer made detailed findings of fact in the I.D., setting forth the facts as generally summarized above and reflected in the parties' Joint Stipulation of Facts. Exhibit 1-A. As a preliminary matter, the Presiding Officer dealt with four affirmative defenses raised by Respondent in its answer to the complaint. Noting that Respondent appeared to have abandoned the defenses of statute of limitations and failure to state a cause of action, neither of which was mentioned in Respondent's original or reply briefs, he nevertheless ruled against Respondent on the merits of both issues. The remaining two affirmative defenses advanced by Respondent, i.e., that the

¹ Item No. 6100 of the Commercial Tariff states that, "unless otherwise provided man-hour rates will be charged for:

* * *

(B) Services of loading, unloading, or transferring cargo for which no specific commodity rates are provided and which cannot be performed at the rates named under NOS and cargo in packages or units of such unusual bulk, size, shape, or weight as to preclude performing such services at rates named under individual items of the tariff.

* * *

(D) Services of extra sorting, special checking, inspection, reconditioning, re-conditioning or for any operation delayed on account thereof."

complaint is barred by the doctrines of laches and equitable estoppel, were held to be inapplicable on the facts of this case.

The Presiding Officer found that the "transload" rate for movement of cargo from railcars to containers, contained in the POS commercial tariff at Item No. 4420, could not be applied to the DOD flour shipments at issue herein. This conclusion was based on the limitation of Item No. 4420 which states that "no sorting, checking, segregating or breakdown of cargo will be performed under this operation."

Although noting Complainant's argument that no sorting was or could be performed in transferring cargo from the 152 railcars which contained pallets marked for a single destination, the Presiding Officer reasoned that the flour shipments taken as a whole did require some sorting. Based upon the parties' stipulation that, for the 58 boxcars which held cargo for multiple destinations,² "the second forklift operator read the destination markings on the pallets and transferred such pallets to the container designated for that port, . . . " (FF9e, I.D. 8), and Complainant's statement that its shipments "for the most part" received no sorting services, he concluded that the transload operation did in fact include some sorting. He therefore held that the commercial transload rate was inapplicable to the military flour shipments.

² As noted above, 57 contained cargo for 2 destinations and one contained cargo for 4 destinations.

The issue of whether the pallets came to a "place of rest on a dock or platform," when placed on the dock by the first forklift operator prior to their pick-up by the second forklift operator, thereby rendering the operation ineligible for rating under Item No. 4420 by the terms of Note 6 to that Item, was found by the Presiding Officer to be unnecessary to the decision in light of his previous holding on the sorting issue. Nevertheless, he stated that, "but for our holding as to the sorting issue, we would have resolved this ambiguity as well as others . . . [including] 'point of rest' against the Respondent," whose arguments that the tariff is clear and unambiguous he termed "linguistic fantasy." I.D. 31, 33.

The Presiding Officer ruled against Complainant's alternative argument that it had been charged twice for the same service because the Port had charged under Item No. 6 of the Military Tariff for rail boxcar unloading and under Item No. 50 of that tariff for "vanning" or stuffing the marine containers. The Presiding Officer found no basis for Complainant's contention that the boxcar unloading services were included in the rates for stuffing containers under Item No. 50, finding that these terms of the Military Tariff at issue, though unnecessarily complex, were not ambiguous.

With respect to Complainant's argument that the Port's application of its tariffs was an unreasonable practice in violation of section 10(d)(1) of the 1984 Act, the Presiding Officer agreed that the vast difference in rates between the

Military and Commercial Tariffs, for services which were essentially the same, constituted an unreasonable practice in violation of the 1984 Act. Citing Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968), and Investigation of Free Time Practices - Port of San Diego, 9 F.M.C. 525 (1966), the Presiding Officer ruled that the "rates charged the Complainant under the military tariff are so excessive that they are not reasonably related to the services rendered and constitute an unreasonable practice related to or connected with the receiving, handling, storing or delivering of property." I.D. 38. Other than "minimal sorting and the need to use two forklifts to reposition the pallets," he found little real difference between the boxcar unloading and van stuffing performed under the Military Tariff and transload operations performed under the Commercial Tariff. He found little definitive evidence in the record to support the differences said to exist by Respondent between military cargo and transload cargo. I.D. 39.

After holding the rates charged Complainant to have been an unreasonable practice under section 10(d)(1), the Presiding Officer proceeded to a consideration of the appropriate measure of reparations. Noting that the Port has agreed to apply the transload rates of Item No. 4420, plus man-hour rates as applicable, to the transfer of palletized military flour shipped through POS after June 1, 1985, and offered to do the same for shipments of canned

goods, the Presiding Officer concluded that the appropriate rate for the flour shipments at issue would have been the transload rate in Item No. 4420 plus any other applicable man-hour charges. However, he was unable to reach a specific measure of damages on this basis because the record did not reflect man-hour records which would allow a proper computation. I.D. 42.³

The Presiding Officer then proceeded to construct an alternative rate based upon the testimony of several witnesses, principally Complainant's witness, Robert Alan Pierce.⁴ In lieu of computing what the actual rate should have been, the Presiding Officer reached an estimate of the "outside limit" of a permissible rate by using an approximation of the time it took to transfer flour shipments (2 to 2.5 hours per boxcar), rounding off the estimate by reference to "pertinent differences between flour shipments and shipments moving under Item No. 4420," and using this figure as the multiplier of the transload

³ Both parties asserted that such records are not available; however, the Presiding Officer indicated his belief that the application of "a little intelligent effort" would produce satisfactory results.

⁴ Pierce had been the Military Dock Supervisor employed by the Port who actually supervised the transfer of the flour shipments.

rate.⁵ He ruled that the outside limits of the rates for the flour shipments should have been three times the transload rate of Item No. 4420, and awarded reparations of \$164,263.69.⁶

B. Exceptions

Exceptions to the Initial Decision have been filed by both parties. Complainant excepts to the determination that at least some of the flour shipments were "sorted" and, therefore, Item No. 4420 does not apply to any of the DOD flour shipments.

Respondent's lengthy Exceptions allege that the Presiding Officer erred in deciding, or declining to decide, a number of issues: (1) failing to find that Item No. 4420 was inapplicable because the cargo came to a "point or place of rest" on the platform; (2) failing to find the differences between the transloading and the military rates to be based upon differences in services and commodities and therefore not an unreasonable practice; (3) establishing a

⁵ The Presiding Officer accepted Pierce's evidence that the transloading of cotton and flour were similar, i.e. two hours per railcar for cotton, and 2 to 2.5 for flour. Apparently, by rounding the higher figure - 2.5 - up to 3, and multiplying by two to take into account the second forklift and forklift operator used on flour shipments, he concluded that six man-hours could be consumed per railcar of flour, compared to two man-hours per railcar of cotton. This calculation resulted in the estimate that three times the transload rate might, at the outside, be justified for the flour transloading.

⁶ This figure represents the difference between the \$375,033.04 paid by DOD and three times the \$70,256.45 (or \$210,769.35) resulting from application of the appropriate rates under Item No. 4420.

dangerous precedent not in consonance with the purposes of the 1984 Act or previous court and Commission precedents under section 17 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. § 816; and (4) failing to find that the Port's application of its tariffs did not violate section 10(b)(12) of the 1984 Act.

Each party filed a Reply to the Exceptions of the other party. On reply, Complainant rebuts 58 specific statements and claims made by Respondent regarding the relationship of transloading rates, the rate charged DOD's flour, and other tariff rates, including those charged for transloading cotton under Item No. 4420 and man-hour rates charged for transloading aluminum ingots. Complainant points out numerous instances in which POS allegedly has mischaracterized the I.D. or the record.

DISCUSSION

The positions of the parties are more specifically discussed below in terms of the issues raised and the Commission's disposition of them.

A. Sorting.

Complainant excepts to the I.D.'s finding that some sorting of the flour was performed and the conclusion that, therefore, Item No. 4420 did not apply to any of the flour shipments. Although DOD concedes that the cargo from

multiple destination boxcars had been sorted,⁷ it maintains that the cargo from single destination boxcars was not sorted, and Item No. 4420 rates should therefore have been applied to this cargo. We cannot agree with the Presiding Officer's conclusion, for which he gave no reason, that all of the DOD flour shipments must be treated as having been sorted merely because DOD concedes that some one quarter of them were.

Sorting, in the context of this case, allegedly consisted solely of the separation of pallets into containers by destination, which was marked on each pallet. DOD points out, however, that for the great majority of boxcarloads, not even such sorting was necessary or possible since all of the contents were destined to a single destination. Thus, DOD submits that the 152 boxcarloads of single destination cargo were not "sorted" and therefore were eligible for the Item No. 4420 rate.

DOD argues that the shipments, made over 28 months and billed for under 94 invoices, should not be viewed as a totality for purposes of determining which tariff rate applies. The Port's charges are said to be severable on a

⁷ This concession, reflected in the Joint Stipulation of Facts, appears to have been based on the observations of DOD's counsel during one on-scene visit (See Transcript, 57). His view is somewhat contrary to the written testimony of DOD's most persuasive witness, Robert Alan Pierce, who had directly participated in the flour transfers at the Port. Mr. Pierce's testimony was that "[f]lour was not sorted," but that the forklift drivers had to read the destination placard on each pallet. Rebuttal Testimony of Robert Alan Pierce, 4.

boxcarload or containerload basis and the applicability of Item No. 4420's transload rates allegedly should depend on whether the cargo stuffed into a particular container has been sorted.

Respondent contends that DOD's shipments cannot be viewed on the basis of the services performed in connection with each individual boxcar. It argues that, although its invoices identify each boxcar and container, the invoices billed on a kiloton basis for the cargo handled "when the job was completed, not per-container or boxcar."

Respondent's Reply to Complainant's Exceptions, 4.

Respondent further argues that "boxcars did not arrive one at a time, were not worked one at a time, and were not billed or invoiced one at a time"; rather, 10 to 12 boxcars would arrive at the Port together and would be worked over several days. Id., 5. Respondent points out that boxcar unloading was covered by 28 invoices each covering from 2 to 13 railcars, and all but 2 of the invoices reflect that one or two multiple-destination boxcarloads were among those unloaded in any group or shipment taken as a whole. Thus, Respondent argues, "some sorting" was involved in transferring the flour shipments at any given time. In addition, "sorting" was allegedly performed because boxcarloads did not divide evenly into containerloads, and pallets from single-destination boxcars sometimes had to be aggregated with those from other boxcars in order to fill containers destined to the same location.

Respondent's position reduces, essentially, to the argument that the mere presence at the CFS simultaneously of full boxcarloads of cargo destined to different ports, to be transferred, one boxcarload at a time, to containers, which were provided and placed by boxcarload, and requiring, inter alia, some aggregation of cargo from different boxcars of the same destination for the efficient filling of containers, constituted "sorting" and a sufficient difference in the services performed to justify completely different rate treatment.⁸ We disagree.

The mere aggregation of cargo from different boxcars containing cargo for the same destination in order to fully utilize container space does not, in our opinion, constitute

⁸ Respondent's argument, as made at oral argument, runs:

Each individual boxcar of cargo that was unloaded had cargoes which had to be transferred into the proper ocean container. If Inchon cargoes whether they came out of a single destination boxcar or a multiple destination boxcar went into a Subic Bay container, the cargoes were not properly sorted.

The record demonstrates the way business was done at the container freight station Multiple rail cars arrived. In every instance, a rail car had cargo for more than one destination. In every instance there were rail cars that, although each rail car may have had single destinations, there were multiple destination rail cars. So one rail car may have had Subic and one may have had Inchon.

But the cargo out of that rail car could not be evenly divided into the number of containers. So cargo from Subic would have to be combined from (sic) cargo of another rail car destined for Subic. It's clear that sorting had to be provided.

Transcript of Oral Argument, 8-9.

"sorting" within the meaning of the limiting language of Item No. 4420. It is therefore concluded that the 152 boxcarloads of single destination cargo were not "sorted".

Nor are we ultimately convinced that the actions described as "sorting" by the Port,⁹ and accepted by DOD with respect to the cargo from the 58 multiple destination boxcarloads, constitute a sufficient service to justify either additional, separate charges under the tariff or rate treatment so different as to yield charges 5 1/3 times those of Item No. 4420. We therefore adopt the Presiding Officer's ultimate conclusion that the Port's application of its tariffs offends the 1984 Act's prohibition against unreasonable practices. To rule otherwise would permit the Port, at its election, to apply commodity rates to some cargoes and "unit" rates to other cargoes, resulting in vastly differing charges, without significant differences in service or clearly defined bases reflected in the tariffs upon which one rate rather than another will be applied.

B. "Point or place of rest."

In response to Respondent's argument that Item No. 4420 does not apply because the pallets came to a "point of rest" when placed momentarily on the platform, Complainant argues that "point of rest" is a term of art in the shipping

⁹ These actions were, apparently, the momentary hesitation involved in the visual identification of destination marked on the pallet by the second forklift driver prior to determining in which direction to drive the forklift for the appropriate container.

industry. It is, contends DOD, not merely a "hypothetical 'way station' used to allocate accounting expenses," not an issue here, but an actual physical location specified by the terminal company at which inbound cargo is deposited and outbound cargo is picked up by the steamship company. Using Respondent's logic and cited cases, DOD contends that the place or point of rest in this case is the floor of the container, since it was the carriers' responsibility to move loaded containers to shipside while the charges for unloading the railcars and loading the containers were assessed solely against DOD.

This issue was fully briefed and argued below. As indicated above, the Presiding Officer ultimately found it unnecessary to rule on this issue, but indicated that he would have resolved the ambiguous and conflicting tariff terms against Respondent. We see nothing in the parties' arguments on Exceptions which detracts from the Presiding Officer's conclusion as to the ambiguous nature of the tariff terms or the resultant resolution of the issue against Respondent. Nor do we find in these arguments any reason to set aside the I.D.'s treatment of the issue in view of our agreement with the Presiding Officer's ultimate conclusion as to the basis for finding the Port's tariff practices otherwise violative of section 10(d)(1).

C. Differences in services and commodities.

Respondent excepts to the Presiding Officer's award of reparations as well as his determination that the rate

charged for specific services was unlawful based upon comparison with another rate. Respondent contends that the Presiding Officer correctly concluded that the services provided in transferring the DOD flour shipments were different from the services which would have been provided to shipments directly transloaded under Item No. 4420, but incorrectly and without authority concluded that the differences in service, though sufficient to render Item No. 4420 inapplicable, were insufficient to justify the difference in rates between the shipments. Respondent further contends that the Item No. 4420 rates upon which the Presiding Officer's comparison is based are in fact "extremely low" rates, never applied to any cargo other than baled cotton which moves at a per-bale rate rather than a per-container rate, pursuant to Note 8 of Item No. 4420.¹⁰ Respondent thus contends that the Presiding Officer's analysis was "a superficial 'comparison' of relative levels of service" which failed to reflect such factors as costs, profitability of the CFS, commodity-based ratemaking, and competition. Exceptions and Brief on Exceptions of the Port of Seattle to the Initial Decision ("Respondent's Exceptions"), 7-8.

¹⁰ Note 8 to Item No. 4420 states:

"Agricultural commodities in excess of 225 kg per individual unit will be rated at \$1.81 per unit. For CY participation, \$1.51 per unit."

Respondent's arguments with respect to the issue of whether application of its tariff constituted an unreasonable practice under section 10(d)(1) of the 1984 Act focus on alleged differences in service provided under the rates in question. It contends, at some length, that the I.D. ignores substantial evidence in the record, and numerous findings of fact proposed in its opening brief, that illustrate significant differences in the services and labor required for flour and other military transfers and those required for direct transload operations. Respondent also argues that the I.D. established a maximum reasonable rate with "virtually no quantitative analysis," but based this determination on the rate agreed to by POS and DOD in 1985 for future shipments.

Complainant points out that, contrary to Respondent's characterization of the record and the I.D., the Presiding Officer did not conclude, and the record does not show, that there were differences in the services provided DOD flour shipments and cargo transloaded under Item No. 4420. Complainant argues that the services were found to be "physically comparable" (I.D. 1); that, of the differences in services claimed by POS, "there is little definitive evidence in the record to support many of them and practically no evidence relating to the specific shipments in issue" (I.D. 38); that some of the claimed differences "were vague and inapplicable" (I.D. 39); and that the alleged differences were "overstated even if technically true" (I.D. 39). Complainant's Reply, 22.

In response to Respondent's argument that the military flour transfer operations used a great deal more labor and time than a normal transload operation, including the use of two forklifts and two forklift operators, Complainant submits inter alia, that: (1) for the only cargo to which Item No. 4420 rates were actually applied -- cotton¹¹ -- two forklifts and operators were required for the start-up operation for each railcar; (2) the excessive manhours sometimes required to unload flour due to "humping" of the railcars were actually spent on reconditioning and reconditioning cargo which had been set "adrift", and were separately charged for under other sections of the Military Tariff, as they would also be under Item Nos. 4420 and 6100 of the Commercial Tariff; ¹² (3) some of Respondent's time/labor comparisons actually refer not to cotton shipments, which took a similar amount of time and were charged under Item No. 4420, but to the transfer of aluminum ingots which were not charged Item No. 4420 rates but Item No. 6100 manhour rates which resulted in charges even lower than the per-container rates of Item No. 4420; and (4) some additional time was required in unloading flour due to the railcar logistics and Respondent's preferential treatment of the commercial aluminum ingot shipments which resulted in

¹¹ The per-bale rate for cotton, moreover, resulted in lower charges than the per-container rates in Item No. 4420, pursuant to Note 8.

¹² See footnote 1, supra.

the flour cars being placed on the far track and being worked through empty aluminum boxcars.

As noted by Complainant, the Presiding Officer specifically found the differences in handling flour and cotton or aluminum relied upon by Respondent to be unsupported in the record. He also concluded that the service differences alleged were an insufficient basis for the great difference in the rates applied, finding that the rates charged DOD were so disproportionate as not to be reasonably related to services which are essentially the same as those performed under Item No. 4420. This is the crux of the matter, the determination which is central to the Initial Decision and the basis upon which the Presiding Officer found the rates violative of section 10(d)(1) of the 1984 Act. As previously indicated, and further discussed below, we find his conclusion to be supported in the record and consonant with the statute and Commission precedent.

D. The 1984 Act and Court and Commission precedent.

Respondent argues that the I.D. is seriously flawed because it runs contrary to the 1984 Act's avowed purpose of minimizing regulation of shipping activities, and will have dire regulatory consequences, including the undermining of commodity-based distinctions in ratemaking. Respondent further alleges that the decision is not consonant with Commission precedents and, in fact, would establish new, and unfounded, precedent by awarding "reparations from a terminal operator on the ground that a specific commodity

rate was unreasonable because it was excessive when compared to a unit rate." Respondent's Exceptions, 8.

Complainant disputes this oft-repeated assertion that the decision unfairly compares a specific commodity rate with a narrowly defined unit rate and will undermine commodity-by-commodity rate making in general. Complainant points out that of the three rates involved here, two are not commodity specific rates, (i.e., Item No. 4420, which is a per-container rate, and Item No. 50, military container vanning, which applied to "freight all kinds, NOS"), and that the latter of these rates accounts for approximately three-quarters of the charges assessed: \$288,665 of the \$375,033 total. Only the boxcar unloading rate, Item No. 6 of the Military Tariff, which specifically lists flour and other commodities, allegedly can be characterized as a "commodity" rate. Thus, Complainant argues, "commodity-by-commodity ratemaking is not involved." Reply of Secretary of the Army to Exceptions and Brief On Exceptions of The Port of Seattle to The Initial Decision ("Complainant's Reply"), 21.

Respondent takes issue with the theoretical underpinning of the I.D.'s finding of violation of section 10(d)(1), that is, the citation to and reliance on the reasoning of Volkswagenwerk and its progeny that terminal charges must be reasonably related to the services rendered. Citing the interlocutory decision in Harrington & Co. v. Georgia Ports Authority, 23 S.R.R. 1276 (1986), Respondent argues that the Volkswagenwerk test is appropriate to judge

the allocation of charges among multiple direct users of common services, but not to compare the services provided different commodities under different rates. It argues that adoption of the reasoning of the I.D. will work major mischief by permitting widespread attacks by shippers on commodity-by-commodity ratemaking throughout the industry, despite the implicit recognition of the validity of such ratemaking in the 1984 Act.

Complainant counters that in Harrington v. GPA, supra, the Commission only refused to apply Volkswagenwerk to vicarious liability issues. Citing the Commission's decision in Pittston Stevedoring Corp. v. New Haven Terminal, Inc., 13 F.M.C. 33 (1969), Complainant argues that the Commission has in the past applied the Volkswagenwerk test to measure the reasonableness of terminal charges involving only one user, not only to allocation among multiple users.

Complainant also refutes the arguments advanced by Respondent that the I.D. would expand the reach of section 10(d)(1) and run counter to the purpose of the 1984 Act to minimize regulation of the shipping industry. Complainant points out that the 1984 Act, like its predecessor, also had as its purpose the establishment of a "non-discriminatory" regulatory process which would protect shippers from discriminatory practices. It is argued that rather than limiting the Commission's discretion by using more specific language, as it had in other sections of the 1984 Act,

Congress worded the prohibition in section 10(d)(1) broadly so as to prohibit the same conduct as was prohibited under section 17 of the 1916 Act.

The Commission finds the Presiding Officer's decision consistent with the relevant court and Commission precedents. The appropriate inquiry under section 10(d)(1) in this case is, as DOD urges and the Presiding Officer found, the Volkswagenwerk standard of "whether the charge levied is reasonably related to the services rendered." Volkswagenwerk, supra, 390 U.S. at 282.

Respondent's arguments regarding the possible effects of the Initial Decision on ratemaking distinctions among commodities are misplaced. DOD's complaint does not allege that flour should be moved at the same rates as cotton or aluminum ingots. The Presiding Officer did not, and we do not, rule here that POS could not, if it so chose to structure its tariff, differentiate among commodities in establishing rates for its services.

The issue of whether the services performed by POS in transferring flour from railcars to containers at the CFS are the same as those performed in transferring cotton (or aluminum ingots) is raised here because the Port instead has established a tariff item for CFS services based upon the packaging and handling characteristics of all kinds of

commodities.¹³ It is DOD's contention that its flour shipments on pallets fit within the packaging and handling requirements set forth in Item No. 4420. We find DOD's position to be supported by the evidence presented on this record.

E. Violation of Section 10(b)(12).

Although the Presiding Officer found it unnecessary to reach the issue of whether section 10(b)(12) of the 1984 Act, prohibiting discriminatory treatment, had been violated, Respondent excepts to this portion of the I.D. insofar as it failed to find that Respondent had not violated section 10(b)(12). Respondent takes particular exception to the Presiding Officer's statement that, had he ruled on the issue, he would have found that DOD met the competitive relationship test under section 10(b)(12) because DOD was in competition with other shippers for use of POS's transload facilities and any showing that POS preferred other shippers over DOD would be sufficient to bring the issue within the purview of section 10(b)(12). Respondent argues that Commission precedents that waive the competitive relationship test, where it is shown that no difference in transportation or competitive conditions exists to justify the difference in rate treatment, are not

¹³ It is also raised, in part, because POS has alleged in its defense that service differences exist that justify the different rate treatment, but the Presiding Officer did not, and we do not, find these service differences to be supported by the record.

applicable in this case. In support of this argument, Respondent again contends that the difference in commodities (i.e., flour vs. cotton) and services performed are sufficient to account for the different treatment accorded these shipments.

Complainant takes issue with Respondent's position, arguing as it did below that the Port's tariff practices in fact violate section 10(b)(12) by subjecting DOD's flour shipments to an unreasonable prejudice or disadvantage vis-a-vis the shippers of cotton and aluminum ingots who received essentially similar services at rates far below those charged DOD.

We find no basis in these arguments on which to set aside the Presiding Officer's treatment of this issue, either as to the need for DOD to show the existence of a competing shipper in order to raise the issue, or the need to decide this issue in view of the disposition of this case on the basis of other issues.¹⁴

F. Reparations.

The rationale for the Presiding Officer's construction of the "outer limit" of a charge which would be reasonably related to the service performed, at three times the rates

¹⁴ In response to POS' equitable arguments that the military rates were initiated and negotiated by DOD and apparently mutually acceptable as applied over a considerable period, Complainant points out that the Military Tariff rates were negotiated in the late 1960's, long before Item No. 4420 was added to the Commercial Tariff in 1981. In common with those already discussed in some detail, these arguments add nothing to the record below and provide no reason to overturn the I.D.

applicable under Item No. 4420, is not explained. It appears to have been an expedient construction based on the comparative manhours consumed in flour transfers vis-a-vis cotton transfers.¹⁵ In any event, the Presiding Officer's calculation ignores the compensating difference in rates built into Item No. 4420 between agricultural commodities charged at a "per bale" rate, such as cotton, and palletized commodities such as the DOD flour shipments.¹⁶ These differences in rates presumably reflected the differences in manhours, and therefore costs, inherent in these operations.

The Commission concludes that the appropriate measure of damages should be Item No. 4420 rates applied to the cargo from multiple-destination boxcars as well as that from single destination boxcars, plus applicable additional manhour charges. This is, in fact, the approach favored but

¹⁵ While the record suggests that the time consumed to transfer a carload of cotton and a carload of flour were similar, the Presiding Officer appears to have concluded that the manhours for flour were twice what they were for cotton because two forklifts and two drivers were used for flour. See Note 5, above. However, according to Robert Pierce, "start-up" operations for cotton boxcars also required the use of two forklifts and two drivers, and were very time-consuming.

¹⁶ Complainant calculated that the \$1.81 per-bale rates charged under Item No. 4420 resulted in per-container costs of \$132.13 for a fully-loaded, 40-foot container of cotton. DOD's Reply to Exceptions, 3-4. The rate applicable to a 40-foot container of palletized cargo for most of the period in question here was \$226.65, or almost twice the per container charges for cotton.

not pursued by the Presiding Officer.¹⁷

This brings us to the issue of the manhour charges that should appropriately have been charged in addition to the Item No. 4420 rates. The I.D. is of little help on this issue. Nevertheless, we found it possible to construct a reasonable estimate of these charges based upon our analysis of the record.

The record suggests that seven of the 210 boxcars were "humped" or damaged in transit, requiring additional labor to straighten, recondition and reappear the cargo. The manhour costs for these additional services were estimated by DOD witness Elizabeth Krause Pierce as totalling \$6,177.59. Her estimate, based upon the tasks required and the number of pallets, works out to an average of six hours per railcar.

Other evidence in the record, chiefly from POS' witness Jimmie Rohrer, CFS manager during the period in question, yields different results. In a letter written in connection with manhour charges for 15 railcars of flour shipped under the rates agreed to in mid-1985 (i.e. Item No. 4420 rates plus applicable manhour charges), Rohrer estimated that 44.5 additional manhours were consumed in the transload operation of the 15 cars in question, due to cargo being "humped." He arrived at the figure of 44.5 additional hours to be charged

¹⁷ His decision not to apply this measure was due to the parties' inability to produce evidence relating to the additional manhours, or to agree to a reasonable estimate thereof.

manhour rates by subtracting (from the longshore labor logs of actual time spent) an estimated four manhours required for "normal" transfer of cargo from a railcar spotted on Track 2 of the CFS.¹⁸ Thus, in this letter at least, POS' witness Rohrer offered a calculation of additional manhours which averaged out to three hours per railcar for cargo which had been dislocated. Exhibit 2 to Prepared Testimony of Elizabeth Krause Pierce. On the other hand, included in that average time were two railcars which took an additional 18 and 22 hours, respectively, because all of the cargo was adrift. These "worst case" instances have been much cited in support of Respondent's arguments in this case that flour shipments consumed an unpredictable amount of time and therefore could not fairly be eligible for the uniform rates

¹⁸ The parties agreed that the DOD flour railcars were usually spotted on Track 2, the farther track parallel to the CFS dock, and frequently had to be worked through the cars delivering aluminum ingots which were spotted on Track 1. This letter, estimating as normal time three manhours for flour railcars spotted on Track 1 and four manhours for those spotted on track 2, is inconsistent in this particular respect with Rohrer's subsequently prepared testimony. There he argues that two hours (i.e. four manhours) was the optimal time for unloading a railcar of flour and that most cars took longer, specifically citing the spotting of cars on Track 2 as one of the factors requiring additional time.

applied under Item No. 4420.19

Elizabeth Pierce's testimony that estimated manhour charges for time spent recooling and reconditioning cargo in the seven boxcars identified as having been damaged totalled \$6,177.59 (Prepared Testimony of Elizabeth Krause Pierce, 7) was disputed by POS witness Rohrer. He challenged not only her basic assumption that the average time for unloading a railcar was two hours (or four manhours), but also her assumption that additional manhours were required only on those occasions where pallets had actually been damaged in transit.

Mr. Rohrer estimated that at least 25 per cent of the railcars required additional time spent to reposition or shore-up cargo to prevent pallets which had shifted in transit from falling. In support of this estimate, he cites the 15 rail cars on which the Port billed additional manhours out of 48 moving during the period from June, 1985 to May, 1986 as representing a more accurate proportion. Rohrer Testimony, 18. Even if Rohrer's unsubstantiated testimony as to the proportion of cars requiring additional labor is accepted, the additional manhour charges would not

¹⁹ These two railcars were part of the last 48 cars shipped through POS after this case was brought, and were not part of the shipments disputed herein. POS has produced no evidence that any such extreme cases of cargo dislocation occurred among the 210 boxcarloads at issue. The fact that the parties cited only seven cars as requiring significant recooling and reconditioning, on which labor was estimated by Elizabeth Pierce at 6 manhours per car, would make it appear that these were the most extreme cases of dislocation which occurred.

come close to justifying the application of rates five and one-third times those otherwise resulting from application of Item No. 4420, though they may be used as an alternative basis for calculating the reparations due DOD.²⁰

With respect to additional manhours chargeable to DOD, along with the Item No. 4420 rates, one more point should be noted. At oral argument, in support of its argument that service differentials existed between commercial cargo transloaded under Item No. 4420 and DOD's flour shipments, Respondent pointed out that "checking" had been performed by a checker for DOD on all shipments up to September, 1984, at which time additional labor for the function was no longer required by the Port's labor agreements. This is reflected in the testimony cited, that of DOD's witness Richard S. Carlyle, Chief of the Cargo Operations Division for MTMC at Seattle. Prepared Testimony of Richard S. Carlyle, 5. Although this testimony supports the charging of some

²⁰ If it is assumed that an average of three additional manhours (based upon the average reflected in Rohrer's September 30, 1985 letter) was required to transfer 25 per cent of the 210 boxcarloads (52 carloads), an additional 156 manhours of labor and other costs may be estimated (utility: 156 hours x \$37.91 = \$5,913.96; supervisor: 156 x \$18.49 = \$2,884.44; foreman: 156 x \$22.71 = \$3542.76; forklift rental: 156 x \$15 = \$2340) to total \$14,681.16. Even the absolute "worst case" scenario cited by Respondent, in which totally dislocated cargo in one railcar took 22 hours of additional labor, if applied to Rohrer's estimated 25 percent of railcars, would result in only \$107,661.89 in additional charges, not the \$300,000 charged and collected by the Port. These calculations are based on the labor rates used by the Port under Item No. 6100 (manhour rates) and 6000 (lift truck rental) of its Commercial Tariff, which are set forth in the Prepared Testimony of Elizabeth Krause Pierce, at 6.

additional manhours to DOD for this service,²¹ this in itself does not appear inconsistent with the application of Item No. 4420 rates to the DOD cargo. Although Item No. 4420 provides that "no sorting, checking, segregating or breakdown of cargo will be performed under this operation . . .," it also provides at Note 4 that "when checking is requested, manhour rates as provided in Item 6100 will apply for this service." Because no additional labor appears to have been required for this function after September, 1984, there appears to exist no basis for additional manhour charges beyond that date.

Thus, we believe a reasonable estimate of the additional manhour charges to be added to the rates applicable under Item No. 4420²² may be constructed as follows:

²¹ Assuming that a checker was provided for the 156 boxcarloads of flour transferred before September 1984, the appropriate charges for two hours per boxcar at the rates then applicable would appear to be:

2 hrs x 63 boxcarloads before Aug 15, 1983 at \$30.43 per hour = \$3834.18;

2 hrs x 93 boxcarloads after Aug 15, 1983 at \$37.91 per hour = \$7051.26;

Total \$10,885.44.

²² The parties agree in the Joint Stipulation of Facts, paragraph 17, that the applicable charges under Item No. 4420 would have been "\$70,256.45 (plus any additional applicable man-hour charges)."

Additional labor for blocking and repositioning shifted pallets in approximately 25 per cent of the railcars:	\$14,681.16 ²³
Additional labor for reconditioning and recoopering damaged pallets:	6,177.59 ²⁴
Checker (provided before September, 1984)	10,885.44 ²⁵
TOTAL Additional manhour charges	31,744.19

Based on these calculations, total reparations due and awarded to DOD are \$273,032.40,²⁶ plus interest.

THEREFORE, IT IS ORDERED, That the Initial Decision served on March 31, 1987 in this proceeding is adopted except to the extent indicated above;

IT IS FURTHER ORDERED, That Respondent Port of Seattle pay reparations of \$273,032.40, plus interest calculated in accordance with 46 CFR § 502.253, to Complainant Secretary of the Army;

²³ See Note 19 above.

²⁴ Prepared Testimony of Elizabeth Krause Pierce, p. 7.

²⁵ See Note 20 above.

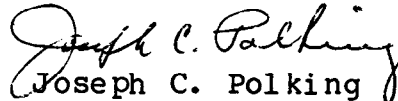
²⁶ This amount is the \$375.033.04 paid by DOD less Item No. 4420 charges (\$70,256.44) and applicable manhour rates, as estimated by the Commission (\$31,744.19).

IT IS FURTHER ORDERED, That Respondent's Exceptions are denied;

IT IS FURTHER ORDERED, That Complainant's Exceptions are granted; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.²⁷


Joseph C. Polking
Secretary

²⁷ Commissioners Moakley and Philbin not participating.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-7

SECRETARY OF THE ARMY ON BEHALF OF THE
DEPARTMENT OF DEFENSE

v.

THE PORT OF SEATTLE

ORDER ON RECONSIDERATION

The Port of Seattle ("Respondent," "Port" or "POS") has filed a Petition for Reconsideration ("Petition") of the Commission's decision finding that it violated section 10(d)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1709(d)(1), and awarding reparations of \$273,032.42 to the Department of Defense ("Complainant" or "DOD"). Complainant has replied to the Petition.

Upon consideration of the Petition, the Reply, and the record as a whole, we herein deny the Petition except to the extent that the parties indicate that they can and will provide evidence relating to man-hour charges for certain functions performed in connection with the shipments at issue, which should have been charged in addition to the basic rates for transloading freight under the Port's commercial tariff. In the event that the parties notify the Commission that they will avail themselves of the

opportunity to present evidence, the case will be reopened and remanded for the purpose of receiving evidence and issuing a supplemental initial decision limited to those issues. The Order Adopting in Part, Reversing In Part and Supplementing the Initial Decision ("Order") is reaffirmed in all other respects.

BACKGROUND

DOD contends in its complaint that the rates charged by the Port for the transfer of 210 boxcar loads of flour, on pallets, to marine containers, pursuant to POS' military tariff, rather than the "transload" rates in its commercial tariff, constituted an unreasonable practice in violation of section 10(d)(1), as well as discrimination against the DOD cargoes in violation of section 10(b)(12) of the 1984 Act, 46 U.S.C. app. § 1709(b)(12). DOD, through its sub-agency the Military Traffic Management Command, shipped the flour on behalf of another DOD sub-agency -- the Army-Air Force Exchange Services -- through the Port of Seattle during the 28-month period from February 7, 1983 to May 31, 1985.

The flour was shipped by rail from Pendleton, Oregon to POS Terminal 106W in 100-pound sacks, plastic shrink-wrapped, on pallets with a maximum of 60 pallets to a boxcar. Each of the 10,351 pallets was marked for one of four final destinations in the Far East. Of the 210 boxcars, 152 contained flour for a single destination, 57 boxcars contained cargo marked for two destinations, and one

boxcar held cargo destined for four different ports of debarkation. The contents of a single boxcar were transferred to three 20-foot or two forty-foot containers.

The rail cars were spotted at one side of the container freight station ("CFS") dock; appropriate marine containers were obtained from the ocean carriers and spotted at the other side of the CFS dock at Terminal 106W. Two forklift trucks and two operators, provided by POS or its agents, transferred the cargo according to detailed written instructions. One forklift operator unloaded a pallet from the railcar and placed it on the dock where it was immediately picked up and placed in the marine container by the second forklift operator. Every other pallet, approximately, was turned for proper positioning in the container, to maximize container utilization.

During the relevant period, POS had on file at the Commission a commercial tariff, POS Terminal Tariff No. 3 ("Commercial Tariff"), as well as Military Tariff No. 2 ("Military Tariff"). The DOD flour shipments were charged a total of \$375,033 for unloading flour in sacks from rail cars (Item No. 6) and stuffing or "vanning" "freight all kinds, NOS" into containers (Item No. 50), both on a metric ton basis, under the Military Tariff.

At the same time, Item No. 4420 of the Commercial Tariff, reflected a single per container rate for direct transloading of palletized cargo between rail cars and marine containers. This item provided:

Direct transloading is defined as the transfer of cargo between inland carrier's equipment and ocean carrier's equipment in a single, continuous movement without coming to a place of rest on any dock or platform. No sorting, checking, segregating or breakdown of cargo will be performed under this operation.

Note 6 to this item further provided:

When cargo comes to a place of rest on a dock or platform, rates in this item will not apply. Car loading or unloading rates and container stuffing or unstuffing rates as elsewhere published herein apply.

Elsewhere in the Commercial Tariff at Item No. 1360(F), "point or place of rest is defined as that area on the terminal facility . . . which is assigned by the terminal for the receipt of outbound cargo from shippers for vessel loading."

The Joint Stipulation of Facts filed by the parties below stated that, if these per container rates for transloading had been charged for the DOD flour shipments, the total cost to DOD would have been \$70,256, plus any additional applicable man-hour charges. The parties also agreed that the only cargo which has ever been transferred at Terminal 106W under Item No. 4420 of the Commercial Tariff was baled cotton in boxcar loads. The record also showed that aluminum ingots were transferred directly from boxcars to marine containers at Terminal 106W, but were charged on a man-hour basis under Item No. 6100 of the

Commercial Tariff rather than Item No. 4420.¹

Presiding Administrative Law Judge Joseph N. Ingolia ("Presiding Officer" or "ALJ") in his Initial Decision ("I.D.") found that the "transload" rate for movement of cargo from railcars to containers, contained in the Commercial Tariff at Item No. 4420, could not be applied to the DOD flour shipments at issue based on the language in Item No. 4420 that "no sorting, checking, segregating or breakdown of cargo will be performed under this operation."² The Presiding Officer further found, however, that the vast difference in rates between the Military and Commercial Tariffs for services which were essentially the same

¹ Item No. 6100 states that, "unless otherwise provided man-hour rates will be charged for:

* * *

(B) Services of loading, unloading, or transferring cargo for which no specific commodity rates are provided and which cannot be performed at the rates named under NOS and cargo in packages or units of such unusual bulk, size, shape, or weight as to preclude performing such services at rates named under individual items of the tariff.

* * *

(D) Services of extra sorting, special checking, inspection, reconditioning, re-conditioning or for any operation delayed on account thereof."

² He reasoned that the flour shipments taken as a whole did require some sorting, based upon the parties' stipulation that, for the 58 boxcars which held cargo for multiple destinations, "the second forklift operator read the destination markings on the pallets and transferred such pallets to the container designated for that port, . . ." (FF9e, I.D., 8), and Complainant's statement that its shipments "for the most part" received no sorting services. He therefore held that the commercial transload rate was inapplicable to the military flour shipments.

constituted an unreasonable practice in violation of section 10(d)(1) of the 1984 Act, citing Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968), and Investigation of Free Time Practices - Port of San Diego, 9 F.M.C. 525 (1966).³

In determining the appropriate measure of reparations, the ALJ concluded that the appropriate rate would have been the transload rate in Item No. 4420 plus any other applicable man-hour charges. However, he explained that he was unable to reach a specific measure of damages on this basis because the record did not reflect man-hour records which would allow a proper computation. I.D., 42.⁴

³ Other than "minimal sorting and the need to use two forklifts to reposition the pallets," he found little real difference between the boxcar unloading and van stuffing performed under the military tariff and transload operations performed under the commercial tariff. He found little definitive evidence in the record to support the differences said to exist by Respondent between military cargo and transload cargo. I.D., 39.

The issue of whether the pallets came to a "place of rest on a dock or platform," when placed on the dock by the first forklift operator prior to their pick-up by the second forklift operator, thereby rendering the operation ineligible for rating under Item No. 4420 by the terms of Note 6, was found by the Presiding Officer to be unnecessary to the decision in light of his previous holding on the sorting issue. Nevertheless, he stated that, "but for our holding as to the sorting issue, we would have resolved this ambiguity as well as others . . . [including] 'point of rest' against the Respondent," whose arguments that the tariff is clear and unambiguous he termed "linguistic fantasy." I.D., 31, 33.

⁴ Although both parties asserted that such records are not available, the Presiding Officer indicated his belief that the application of "a little intelligent effort" would produce satisfactory results.

The Presiding Officer therefore estimated the "outside limit" of what a permissible rate would have been by using an approximation of the time it took to transfer flour shipments (2 to 2½ hours per boxcar), rounding off the estimate by reference to "pertinent differences between flour shipments and shipments moving under Item No. 4420," and using this figure as the multiplier of the transload rate. He awarded reparations of \$164,263.69, which was the difference between the amount charged DOD (\$375,033.04) and three times the transload rate of Item No. 4420, (3 x \$70,256.45 or \$210,769.35).

Both parties filed Exceptions to the Initial Decision. Complainant excepted to the ruling that at least some of its cargo had been sorted, urging that the Item No. 4420 rates were applicable to the 152 boxcar loads of single-destination cargo. Respondent filed Exceptions to the I.D. with respect to a number of issues, arguing inter alia that the difference in rates charged for transferring flour and cotton were justified on the basis of differences in the commodities and that the I.D. would undermine the standard industry practice of commodity-by-commodity ratemaking. Each party replied at length to the Exceptions of the other party. The Commission heard oral argument.

The Commission's Order reversed the Presiding Officer's determination that the sorting of some of the DOD cargo rendered Item 4420 of the Commercial Tariff inapplicable to any of the cargo. The Commission specifically found that

the 152 boxcar loads of single destination cargo had not been sorted. But the Commission also concluded that the ALJ had correctly found that POS' application of its tariffs violated section 10(d)(1) because the Port would otherwise be able to apply vastly differing charges to cargo receiving essentially the same services, at its sole election, without a clearly defined basis reflected in its tariffs.

The Commission agreed with the Presiding Officer's conclusion that the service differences in handling flour and cotton alleged by Respondent were unsupported in the record and were an insufficient basis for the great difference in the rates applied. The Commission specifically noted and concurred in the I.D.'s finding that the rates charged DOD under the Military Tariff were so disproportionate as not to be reasonably related to the services rendered, which were essentially the same as those performed under Item No. 4420 of the Commercial Tariff. This determination was, the Commission said, "the crux of the matter, . . . central to the Initial Decision and the basis upon which the Presiding Officer found the rates violative of section 10(d)(1)." Order, 20. The Commission therefore denied Respondent's Exceptions.⁵

⁵ The Commission also adopted the I.D. findings with respect to the issues of violation of section 10(b)(12), the "point or place of rest," and alleged differences in services or commodities. It rejected Respondent's theory, urged on Exceptions, that the case involved an attack on commodity-by-commodity ratemaking and contravened legislative policies recognizing such ratemaking embodied in the 1984 Act.

However, with respect to the measure of reparations which should have been applied to the violation of section 10(d)(1), the Commission reversed the Presiding Officer and computed appropriate reparations based upon its own analysis of the record. The Commission concluded that the Presiding Officer's "outside limit" of a permissible rate, based on the comparative man-hours consumed in flour transfers vis-a-vis cotton transfers, was unnecessary in light of what appeared to be "compensating differences in rates built into Item No. 4420 between agricultural commodities charged at a 'per bale' rate . . . and palletized commodities . . ."

Order, 26.

Having found no basis upon which to conclude that the services performed in transferring flour differed materially from those performed in transferring cotton, the Commission concluded that the appropriate measure of damages should be based on Item No. 4420 commercial rates, applied to both cargo from multi- and single-destination boxcars, plus applicable man-hour charges. The Commission's analysis of the record, including references to the evidence of Complainant's witnesses, Elizabeth Pierce and Richard Carlyle, and Respondent's witness, Jimmie Rohrer,⁶ resulted

⁶ The Commission noted that the testimony offered by Respondent's witness, Jimmie Rohrer, in this proceeding was inconsistent in certain respects with statements made by Mr. Rohrer in an earlier letter dealing with the same subject (the time normally consumed in transferring flour) which was appended to the testimony of Complainant's witness, Elizabeth Pierce.

in the calculation of additional charges for reconditioning and reconditioning pallets damaged in transit, blocking and repositioning cargo which had shifted in transit, and checking, totalling \$31,744.19. The Commission awarded reparations of \$273,032.40.

Respondent thereupon filed its instant Petition to which Complainant replied.

DISCUSSION

The Petition for Reconsideration alleges that Respondent was deprived of fundamental fairness and due process by the Commission's "reversal" of the concession by DOD that its cargo had been sorted, and the calculation of reparations based upon a deficient record, presumptions and estimates not supported by the record or in issue below. Respondent accuses the Commission of a number of errors of fact based upon controverted testimony not subjected to cross-examination.

Respondent's numerous accusations of unfairness and error against both the Commission and the Complainant are not supported by the record. In many instances, the errors of fact alleged by Respondent are simply rearguments of positions it asserted below.

Specifically, POS suggests that it misunderstood or was misled as to the issues in this case, or that the Commission's decision somehow changed the issues in this case, from a simple one of which of two rates applied (Item

No. 4420 of the Commercial Tariff or the Military Tariff rates) to one of whether the rates themselves were unreasonable. In fact, the complaint encompassed, and the arguments below focused on, issues of whether POS' application of the widely different rates and rate structures reflected in the two tariffs were an unreasonable practice in and of themselves, as well as whether the practice unreasonably discriminated against DOD. The issue was clearly and precisely presented and argued in DOD's Trial Brief,⁷ which was filed before any testimony or formal briefing by either party.

POS would shift the argument by accusing the Commission of finding that one set of rates - the military - standing alone, was unreasonable because it was not reflective of costs. While this proposition may be true, it is not what was alleged, argued or found in this case. In greatly simplified form, the issues as framed by the parties below may be summarized as follows. DOD alleged that the practice of applying the much higher military rates to cargo which fit within the description given for unit rates under the Commercial Tariff was unreasonable. POS' response was that the practice was reasonable because there were additional costs for services associated with the military cargo, and because the cargo did not really fit the Commercial Tariff description. DOD replied that the differences were non-

⁷ DOD's Trial Brief was a pre-hearing document, filed with the parties' Joint Stipulation of Facts.

existent and were not shown by the evidence, and that the cargo was not excluded from the tariff description. No one changed the issues. They were joined, argued, heard and decided on the evidence adduced by the parties, under a procedure and a schedule agreed to by the parties. POS' belated attack upon the process appears to arise from its dissatisfaction with the results.

Respondent complains that the Commission reversed the Presiding Officer's "conclusion of fact" that sorting was provided in connection with DOD cargoes as well as his "conclusion of law" that Item No. 4420 was inapplicable because sorting had been provided. Respondent takes exception to the acceptance of the "controverted" testimony of one witness that sorting was not provided, and the Commission's "finding" that DOD's concession that sorting services were provided was based on DOD's counsel's on-site visit.⁸

The arguments raised by Respondent as to deprivation of fundamental fairness and due process relate in multiple ways to two issues: the sorting issue and the calculation of reparations. We discuss Respondents due process contentions with respect to the sorting issue first, in two phases:

⁸ DOD's presentation at oral argument concerning the sorting issue reiterated its position that no sorting had been done with respect to the cargo in the 152 single destination boxcars, but conceded that the cargo in the 58 multiple destination boxcars had been sorted. The basis for the concession appears to have been the observations of DOD counsel during an on-site visit. See Transcript of Oral Argument, 57.

DOD's alleged concession of the sorting issue, and the filing of testimony by Robert Pierce.⁹

POS alleges that DOD conceded early in the case that sorting had been performed in connection with its flour shipments and that Respondent's case had been structured in reliance on that concession. POS charges that DOD's testimony to the contrary - that of Robert Pierce, the Military Dock Supervisor employed by the Port - was not filed until after the Port had waived its right to cross-examine DOD witnesses in an oral hearing,¹⁰ and after DOD had conceded that some sorting had been performed.

In its Reply to the Petition, DOD maintains that Respondent has "misunderstood" the Commission's decision with respect to the sorting issue, pointing out that the Commission's decision made a finding that no sorting was performed on the 152 carloads of single-destination cargo but made no specific finding with respect to the 58 boxcar loads of multiple-destination cargo. DOD also argues that POS was not misled as to the sorting issue by DOD's position (or "concession"), which at all times was that no sorting whatsoever had been performed with respect to the single-

⁹ Respondent also complains that the Commission relied upon Robert Pierce's testimony for two other crucial findings of fact on which it had no opportunity to cross-examine him: the comparative man-hours required for cotton and flour transfers, and the use of two forklifts and two drivers for "start-up" operations in unloading cotton. See discussion at pages 22 to 24, infra.

¹⁰ See discussion at pages 18 to 20, infra.

destination carloads. DOD further explains that, until after the I.D., it had taken the position that virtually no sorting had been performed on the 57 remaining boxcar loads of cargo going to two destinations because, in accordance with industry practice, the cargo was segregated behind movable bulkheads at opposite ends of the boxcars.

Thus, DOD points out, the only "concession" it made was the very limited and candid admission in its Trial Brief that in "rare instances" these 57 boxcars contained intermingled or misplaced pallets which led it to state that DOD cargo "for the most part received no sorting."¹¹ DOD explains that it is this characterization of DOD's position, in its Trial Brief, that POS has, by "verbal alchemy" turned into a full-scale concession on the most hotly contested issue in the case. DOD points out that POS' case at no point rested on this "concession," but that each of the Port's witnesses in direct and rebuttal testimony alleged that the activities performed on all DOD shipments of flour constituted sorting, the position argued by POS in its Opening and Reply briefs. DOD notes that the actual concession made by it, that the 58 boxcar loads of multiple destination cargo were sorted, was not made until oral argument, long after all briefs had been filed. Thus, DOD concludes, the Port's arguments and evidence did not depend upon DOD's "concession."

¹¹ DOD also conceded in its Opening Brief, filed simultaneously with the Port's, that one carload of cargo destined to 4 locations had been sorted.

Respondent's charges that it was misled in structuring its case by reliance upon a point conceded by Complainant do not comport with the extent and timing of the actual concession made by DOD on this issue. As DOD points out in its Reply, the "concession" actually made in its Trial Brief was limited to the occasional, errant pallets loaded, contrary to industry practice, out of place in the multi-destination carloads. Complainant's counsel's later statement that these 58 boxcar loads were indeed "sorted" was not made until after the Initial Decision, and could not feasibly have been the basis upon which the Port structured its case. The testimony and briefs support DOD's position in that they reflect that the issue, as framed by the parties, was contested throughout this proceeding.

POS' argument on the "sorting" issue also appears to change the nature of the issue in accordance with its needs to create a basis for reconsideration. Thus, it mischaracterizes the Commission's decision as overturning factual conclusions of the ALJ, stipulations of the parties, and concessions. The "concession" has been discussed above.

The "factual conclusions" of the ALJ allegedly overturned by the Commission refer to his conclusion that the sorting of some cargo rendered Item No. 4420 inapplicable to any of the DOD cargo - including the 152 boxcar loads of single destination cargo for which DOD has consistently maintained that no sorting was performed. What the Commission reversed was the Presiding Officer's

determination to treat all of the cargo alike, not his findings of fact. See Order, at 12-15. The inference he drew from the facts, that the limiting language of Item No. 4420 thus excluded from its application any of DOD's cargo, may be characterized as a conclusion of law rather than a finding of fact,¹² or at least a mixed question of law and fact.

In reality, the facts relating to sorting - who did what to the pallets of flour - have never really been in dispute. The Joint Stipulation of Facts, filed with DOD's Trial Brief, describes the movements, indicating only that for pallets withdrawn from multiple-destination carloads, the second fork-lift driver had to read the destination marked on each pallet. Joint Stipulation of Facts, 4. The description of the cargo movements in testimony by DOD's witness Kirby is similar. This statement is not inconsistent with DOD's later concession that cargo from these 58 boxcars was "sorted," or with the Commission's conclusion that this activity could not be reasonably related to the excessive difference in charges between the commercial and military rates.

POS' objection to what it characterizes as the Commission's reversal of DOD's "concession" that the 58 boxcar loads of cargo had been sorted, based on the allegedly belatedly-offered rebuttal testimony of Robert

¹² POS appears, moreover, to have characterized the issue in precisely this manner at page 7 of its Reply Brief.

Pierce, reverses the chronological order of events.¹³ It also mischaracterizes the Commission's Order. The Commission did not, in fact, make any finding contradicting DOD's statement that 58 boxcar loads had been sorted. What the Commission did was to express, in a footnote, its observation that this admission was made by, and arose from activities of, counsel rather than from the testimony placed in the record, some of which at least expressed a contrary position. The Commission's observation, moreover, does not rise to the status of a "finding," as POS would have it, or overturn any finding of fact made by the Presiding Officer. In effect, the Commission went on to note, the question of whether the activities performed on any of the cargo constituted sorting did not affect the Presiding Officer's "ultimate conclusion" that the disparity in rates was not reasonably related to any differences in services performed and thus constituted an unreasonable practice.¹⁴

The Commission, like the ALJ, ultimately concluded that POS's application of its tariffs offended the requirements of section 10(d)(1) of the 1984 Act whether or not any of the cargo was sorted, including, obviously, whether cargo

¹³ As noted above, the "concession" cited on this point occurred at oral argument, long after receipt of all testimony, including that of Robert Pierce, whether belatedly offered or not.

¹⁴ The Presiding Officer characterized these activities as "minimal sorting," and found that other alleged differences in services rendered flour and commercial transload cargo (i.e., cotton) were unsubstantiated, inapplicable or overstated. See I.D., 38-39.

from 58 or 210 boxcars was sorted, or whether or not Item No. 4420 technically applied to this cargo because of the sorting.¹⁵ The Presiding Officer's and the Commission's conclusion was that the services were so similar that the application of the vastly different rate structures and rates reflected in the Military and Commercial Tariffs was an unreasonable practice. We reaffirm that conclusion.

Respondent also urges the Commission to reconsider its decision of the sorting issue on the due process grounds that it was deprived of the opportunity to request cross-examination by the filing of the rebuttal and surrebuttal testimony of Robert Pierce, after the opportunity to request an oral hearing had passed.

DOD replies that Respondent was not misled or denied due process in structuring its case by either Complainant or the Commission with respect to the testimony of DOD witness Robert Pierce. DOD points out, in some detail, that the timing of events which led POS to waive its opportunity to request an oral hearing for cross-examination of DOD's witnesses prior to the filing of rebuttal testimony was due to POS' own delay of the previously agreed upon procedural

¹⁵ In its Reply to the Petition, DOD points out that the Commission did not hold that Item No. 4420 rates were applicable to its cargo but merely that reparations should be based on those rates. While DOD is technically correct, we wish to make clear that Item No. 4420 rates should have been applied to the 152 boxcar loads of single destination cargo and that, in determining reparations, the same rate should be applied to the remaining 58 boxcar loads because no significant additional services have been shown which would justify the application of widely different rates.

schedule.¹⁶ DOD notes that Respondent did not then or at any time prior to the I.D. seek an oral hearing, but rather filed surrebuttal testimony of Jimmie Rohrer not provided for in the procedural schedule with its Opening Brief.

Complainant did not object to the Respondent's motion for admission of this additional testimony but did, in reply to the motion, request that its own surrebuttal testimony of witness Robert Pierce be similarly admitted to the record, in accordance with the parties' agreement to the original schedule under which Complainant would have the last opportunity to present evidence. Respondent, in reply to this request, objected to the admission of Robert Pierce's surrebuttal and reiterated these objections in its arguments to the Commission on Exceptions.¹⁷ Thus, points out DOD, Respondent was not deprived of the opportunity to address the testimony of Robert Pierce to which it objects but

¹⁶ By agreement of the parties, Complainant's direct testimony was to be filed first (rather than simultaneously with Respondent's direct testimony) on October 17, 1986, and Respondent's direct and rebuttal testimony would be filed on November 17, 1986. Complainant's Rebuttal testimony was to be filed on December 5, 1986, prior to the December 15, 1986 deadline for requesting an oral hearing. Absent a request for oral hearing, Complainant's rebuttal testimony would ordinarily be the last testimony filed. When, however, Respondent requested a 3-week delay for filing its testimony, it also informed the Presiding Officer that it appeared likely that an oral hearing would be unnecessary. It requested no delay in the deadline for making that decision, and in revising the procedural schedule in accordance with this request, the Presiding Officer indicated there would be no oral hearing by agreement of the parties and warned them against further delays.

¹⁷ The Presiding Officer admitted into the record both sets of surrebuttal testimony.

actually did so on two occasions.¹⁸

These due process issues related to the receipt of Robert Pierce's testimony were raised and disposed of below, in the I.D., at 5-6. Although the Presiding Officer's disposition of this issue was not specifically dealt with in the Commission's Order, it was part of the I.D. adopted by the Commission. We continue to agree with the Presiding Officer's ruling that the Complainant was under no obligation to offer Robert Pierce's testimony as direct testimony and that testimony was in fact responsive to the testimony of Respondent's witness, Jimmie Rohrer. We see nothing in POS' arguments for reconsideration that indicates that Respondent lacked the opportunity to respond to Robert Pierce's testimony or was unduly disadvantaged by the timing of its filing.

We turn now to Respondents arguments with respect to the award of reparations, including its due process arguments on this issue. The Commission's calculation of reparations is alleged to be fatally flawed, even if the use of Item No. 4420 as a base is accepted, because: it fails to take into account additional man-hours consumed in other services provided in the military flour transfers; the man-hour charges for supervisory and foreman personnel are understated; and charges for checking and reconditioning pallets are inaccurate. Respondent argues

¹⁸ DOD also points out that the Petition, at 22, indicates that, in fact, Respondent had no desire to cross-examine Robert Pierce or any other DOD witness, up to the filing of Robert Pierce's surrebuttal testimony.

that the issue of additional man-hours - to be added to rates under Item No. 4420 - only arose after the I.D., and that Respondent was thereby deprived of the opportunity to present evidence on these issues when the Commission, without warning, made its own calculations of these items.

In reply to the Port's arguments that it was deprived of the opportunity to address the issue of the Commission's methodology in constructing reparations, and that there were material errors of fact in the Commission's calculations due to the incomplete nature of the record, DOD submits that Respondent is merely attempting to reargue its case. DOD accuses the Port of "Monday morning quarterbacking" in alleging that the Commission made errors of fact in calculating reparations on the basis of an incomplete record. DOD maintains that POS had the opportunity to present evidence with respect to the differences in services it allegedly provided DOD cargo and other cargo, and concludes that no denial of due process results from a decision rendered on the evidence presented. DOD points out that although Respondent now claims that it saw no need to quantify the costs of the additional services it alleged below, the Port did present evidence and arguments relating to such service differences but that these were found unsubstantiated by the ALJ and the Commission.

Respondent's argument that it was deprived of due process because the Commission's decision allegedly raised and decided issues on which it had no opportunity to present

evidence, again, appears to be an attempt to reform the issues and the decision into a more challengeable form. The record indicates that from its inception this proceeding involved DOD's claim that it should have been charged the rates at Item No. 4420 of the Commercial Tariff, "plus applicable additional man-hours." Part of POS' defense to this claim was that the services rendered DOD flour involved so many man-hours of labor that Item No. 4420 could not be considered applicable. Much of Jimmie Rohrer's testimony with respect to the handling of flour concerned the number of man-hours consumed for a "normal" transfer and the frequency of occasions on which greater labor costs were incurred because carloads had been dislocated or "humped," as well as other services performed. The testimony of DOD's witnesses, especially that of budget analyst Elizabeth Pierce and military dock supervisor Robert Pierce, similarly addressed these time and labor issues. The fact is that DOD had ample opportunity to present its case on these issues. Any failure by the Port to produce evidence relating to the costs of services it claimed to have performed should not now be attributed to the Commission's procedures or to the framing of this issue.

Finally, among the grounds on which POS objects to the Commission's determination that Item No. 4420 rates should be used in constructing reparations in this case is the Commission's reliance on Robert Pierce's testimony for what POS characterizes as "crucial findings of fact." These are

that the time consumed for cotton and flour transfers were the same, and that two forklifts and two drivers were used for cotton transfers.¹⁹ POS's procedural objections to the receipt of this testimony have been discussed above.

Once again, POS overstates the scope of the Commission's discussion as well as the weight given this testimony. POS charges that the Commission made a "factual conclusion" that two forklifts and two drivers were used for cotton unloading on the basis of Robert Pierce's "untested" surrebuttal testimony. The Commission made no such finding, however. The Commission, in discussing the Presiding Officer's construction of a permissible "outer limit" for POS' rate on the flour transfer, noted that he had apparently calculated greater labor costs for flour than for cotton and therefore permitted POS to charge three times the Item No. 4420 rates.²⁰ The Commission, in a footnote, merely noted that Robert Pierce's testimony cast doubt on POS' argument that flour was so much more costly to move

¹⁹ As to the first, the Commission relied on all of the evidence, including Jimmie Rohrer's as well as Robert Pierce's.

²⁰ The ALJ apparently accepted Complainant's witness Robert Pierce's evidence that the transloading of cotton and flour were similar, i.e., two hours per railcar for cotton, and two to 2½ for flour; apparently by rounding the higher figure - 2½ - up to 3, and multiplying by two to take into account the second forklift and forklift operator used on flour shipments, he concluded that six man-hours could be consumed per railcar of flour, compared to two man-hours per railcar of cotton. This calculation resulted in the estimate that three times the transload rate might, at the outside, be justified for the flour transloading.

than cotton because cotton required only one forklift and driver while flour required two. The Commission went on to indicate that, in any event, the ALJ's assumption that higher rates for flour than those reflected in Item No. 4420 could be justified by the differences he calculated in labor utilized for flour as opposed to cotton appeared to be undercut by the difference between the per bale and palletized cargo rates of Item No. 4420.²¹ For this reason, the Port's argument that Item No. 4420 was inapplicable and that it should not be applied as the basis for reparations, based on these alleged differences in man-hours consumed, is not persuasive.

POS alleges that the Commission's construction of estimated additional man-hours, to be added to the Item No. 4420 rates, rests on numerous material errors of fact and misconstruction of the evidence in the record. In calculating reparations, the Presiding Officer expressed dissatisfaction with the state of the record, noting the parties' statements that existing documentation was insufficient to yield more precise data, but was of the

²¹ Respondent objects that this constituted an unfounded "presumption" that differences in the per bale and palletized rates set forth under Item No. 4420 were compensatory for different labor costs, upon which the Commission based its decision. In reply, DOD characterizes the Commission's discussion of this point as an attempt to give POS the benefit of the doubt that its charges were reasonably related to the services rendered. No "presumption" was made by the Commission, which simply took note of the facts of record, that Item No. 4420 included different rate levels tied to the packaging of cargo.

opinion that "diligent effort" would reveal more information. He suggested that the Commission remand the case to him for that purpose. Although we considered this as a possible course of action, we elected, in the interest of a more expeditious disposition of this matter and based on the extensive record established thus far, to utilize the information supplied by the parties to construct an estimate of appropriate additional man-hour charges.

Thus, the analysis in our Order compared the various time estimates for the transfer of flour and concluded that the evidence, on the whole, supported the conclusion that a carload of flour could be transferred from a railcar on Track 2 adjacent to the CFS in two hours, using four man-hours of labor for two forklift drivers and two forklifts. This was consistent with the testimony of DOD witnesses Carlyle and Robert Pierce, and with the letter prepared by POS witness Rohrer, prior to this litigation, in connection with later DOD flour shipments. The Commission, nevertheless, also accepted the testimony of Jimmie Rohrer that many carloads of flour took additional time to unload because the cargo had shifted in transit and had to be shored up. Based on his estimate of "at least 25 percent," the Commission computed additional man-hour charges for three man-hours of labor on twenty-five percent of DOD's

carloads.²² POS, however, now alleges that the Commission relied on "controverted"²³ testimony, including that of Elizabeth Pierce who allegedly understated charges for supervisory time.²⁴

POS alleges other errors and miscalculations in the construction of reparations, chiefly that the charges for reconditioning and reconditioning pallets were too low;²⁵ other services provided, which were covered by the Military Tariff rates, should have been added; charges for the repositioning

²² The three-hour figure was derived from Rohrer's pre-litigation letter calculating additional man-hours to be charged for 15 carloads of flour which had arrived at POS in varying degrees of dislocation. Included were two cars in which the cargo was totally adrift.

²³ In numerous instances, Respondent accuses the Commission of basing its decision on "controverted" evidence or, similarly, evidence not tested by cross-examination, thereby implying that evidence or testimony contrary to that offered by its own witnesses is lacking in probity, credibility or weight. While it would be easier to decide contested issues if only one party offered evidence, the Commission must nevertheless make its determination based upon a weighing of all the evidence presented.

²⁴ In making these calculations, the supervisory time allocated was based on the written testimony of Elizabeth Pierce whose own calculations appeared to rest on the letter from Jimmie Rohrer.

²⁵ The Commission accepted the cost estimate of Elizabeth Pierce on this point which related to the 7 cars which had been "humped". POS evidence to the contrary consisted of Rohrer's testimony that DOD had been charged reconditioning and reconditioning on only these cars because it was assumed that additional labor expended on cargo from less severely dislocated cars was included in the Military Tariff rates charged. No estimate of these costs was offered. Instead, Rohrer estimated that 25 percent of cars required more than the optimal time to unload which estimate the Commission also accepted and incorporated into its calculations.

of railcars and spotting of containers should be included, as well as charges for warehousing, clean-up services, rail demurrage, and compensation for the risks associated with checking and sorting. Some of these alleged errors are but rearguments of contentions already considered and rejected. The Presiding Officer heard these arguments and found the claims of POS to have provided these additional services to be unsubstantiated, unrelated to the shipments in question, or overstated. As before, we find no reason to disturb these findings of the ALJ.

We recognize, however, that the record is far from perfect on a number of points related to the additional man-hours for which POS would have been permitted to charge in addition to the Item No. 4420 rates. While clarification of these points is desirable, we recall the parties' statements below that man-hour records are not available which would allow a proper computation. We are, therefore, reluctant to commit further Commission resources, as well as those of the litigants, to proceedings of doubtful utility whose purpose would be to resolve issues relating to a small proportion of the charges at issue in this case. Nevertheless, we will grant Respondent the opportunity to present evidence limited to the specific issues outlined below if it notifies the Secretary of the Commission within 15 days of the date of this Order that it possesses and will present material evidence concerning the issues described below.

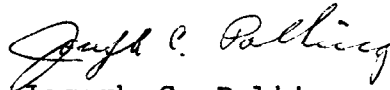
If the Respondent notifies the Secretary of the Commission that it is prepared to present evidence related to the number of applicable additional man-hours for which Complainant should have been charged in addition to the rates set forth at Item No. 4420 of Respondent's Commercial Tariff, this proceeding is reopened and remanded to the Presiding Officer for further proceedings limited to the additional man-hours associated with the services found in the Commission's Order to have been performed in connection with DOD flour shipments at POS terminal 106W during the period from February 7, 1983 through May 31, 1985. In the interest of expedition, the proceedings are, moreover, to be completed and a supplemental initial decision issued within a prescribed period. If Respondent does not take advantage of this procedure, the Commission's Order is affirmed in all respects.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration is denied, and the Commission's Order Adopting in Part, Reversing in Part, and Supplementing the Initial Decision is affirmed, in all respects save the amount of reparations to be awarded; and

THEREFORE, IT IS FURTHER ORDERED, That with respect to the amount of reparations awarded Complainant, the Petition for Reconsideration is denied and the Order Adopting in Part, Reversing in Part, and Supplementing the Initial Decision is affirmed upon condition that Respondent does not notify the Secretary of the Commission within 15 days that

it will present evidence related to the issues described below. If the Respondent notifies the Secretary of the Commission that it is prepared to present evidence related to the number of applicable additional man-hours for which Complainant should have been charged in addition to the rates set forth at Item No. 4420 of Respondent's tariff, this proceeding is reopened and remanded to the Presiding Officer for further proceedings and issuance of a supplemental initial decision within 90 days limited to the types of labor, including supervisors, number of man-hours expended and the applicable man-hour charges for checking, reconditioning and reconditioning damaged pallets, shoring up cargo shifted in transit, spotting containers and moving railcars, performed in connection with DOD flour shipments at POS terminal 106W during the period from February 7, 1983 through May 31, 1985.

By the Commission.²⁶


Joseph C. Polking
Secretary

²⁶ Commissioner Philbin not participating.

THE SECRETARY OF THE ARMY
ON BEHALF OF THE
DEPARTMENT OF DEFENSE

V.

THE PORT OF SEATTLE

• • • • •

It is hereby agreed by and between the Secretary of the Army on behalf of the Department of Defense (DOD) and the Port of Seattle (the Port), that the parties do hereby settle and compromise Federal Maritime Commission Docket 86-7, a complaint arising out of service provided in connection with shipments of flour between February 7, 1983 through May 31, 1985 at the Port of Seattle, upon the following terms:

This is the amount of reparations awarded to DOD by Commission Decision. DOD has waived payment of interest and attorney fees by

way of compromise in order to avoid further protracted litigation over the amount of reparations due.

In consideration for this payment, DOD hereby releases and forever discharges the Port of Seattle, its officers, agents and employees from all liability, claims and demands of whatsoever nature arising from the incidents which are the subject of this docket. Likewise, the Port so releases and discharges DOD. It is understood that the aforementioned compensation is given in compromise of a disputed matter, and accordingly does not constitute, nor shall it be construed as, an admission of liability by the Port.

The Port and DOD agree to take joint action to cause FMC Docket 86-7 to be terminated.

The Port of Seattle

By: 

John W. Angus, III
Attorney for The Port of Seattle
1735 New York Avenue, N.W.
Suite 500
Washington, D.C. 20006

The Secretary of the Army on
behalf of the Department of Defense

By: 

James E. Armstrong
General Attorney
Regulatory Law Office
U.S. Army Legal Services Agency
5611 Columbia Pike
Falls Church, VA 22041-5013

November 14, 1988

(S E R V E D)
(NOVEMBER 23, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

November 23, 1988

DOCKET NO. 86-7

THE SECRETARY OF THE ARMY ON BEHALF OF
THE DEPARTMENT OF DEFENSE

v.

THE PORT OF SEATTLE

Settlement of a proceeding to determine whether or not the Respondent had violated sections 10(b)(12) and 10(d)(1) of the Shipping Act of 1984 (46 U.S.C. app. §§ 1709(b)(12) and 1709(d)(1)) approved. The Respondent is ordered to pay \$273,032.40 (without accrued interest), pursuant to the terms of a settlement agreement made a part of this decision.

SETTLEMENT AGREEMENT AND JOINT MOTION
TO TERMINATE PROCEEDING APPROVED

This proceeding was begun by a complaint filed by the Secretary of the Army on behalf of the Department of Defense ("Complainant") alleging that the Port of Seattle ("Respondent") had violated sections 10(b)(12) and 10(d)(1) of the Shipping Act

of 1984 (the "Act"), 46 U.S.C. app. §§ 1709(b)(12) and 1709(d)(1). The complaint alleged that the Respondent had subjected the Complainant to undue and unreasonable disadvantage and failed to establish just and reasonable practices, respectively, by charging the Complainant 434 percent more than commercial shippers would have paid for the same services in connection with certain shipments of flour which occurred during the period from February 7, 1983, through May 31, 1985. The complaint sought reparations of approximately \$300,000 plus interest and attorneys' fees.

After several settlement discussions which were unsuccessful the case was tried on written testimony, documentary evidence and a joint stipulation of facts. The parties then filed original and reply briefs. An Initial Decision was served on March 31, 1987, to which both parties filed exceptions. On October 29, 1987, the Commission served an Order Adopting in Part, Reversing in Part, and Supplementing the Initial Decision. Both the Initial Decision and the Commission's Order are incorporated herein by reference. The Respondent then filed a Petition for Reconsideration to which the Complainant filed a Reply.

On September 6, 1988, the Commission issued an Order on Reconsideration, which is incorporated herein by reference. In essence, the Commission's September 6th Order denied the Complainant's Petition for Reconsideration, except as to the amount of reparations to be awarded. With respect to reparations it ordered that:

If the Respondent notifies the Secretary of the Commission that it is prepared to present evidence related to the number of applicable additional man-hours for which Complainant should have been charged in addition to the rates set forth at Item No. 4420 of Respondent's tariff, this proceeding is reopened and remanded to the Presiding Officer for further proceedings and issuance of a supplemental initial decision within 90 days limited to the types of labor, including supervisors, number of man-hours expended and the applicable man-hour charge for checking, reconditioning and reconditioning damaged pallets, shoring up cargo shifted in transit, spotting containers and moving railcars, performed in connection with DOD flour shipments at POS terminal 106W during the period from February 7, 1983 through May 31, 1985.

By letter dated September 15, 1988, the Respondent did advise the Secretary that it was prepared to present evidence on the above-described issue so that the remand became effective. As a result of meetings and consultations since that time the parties advised that they intended to settle this proceeding. On November 16, 1988, they submitted a written Settlement Agreement as well as a Joint Motion to Terminate Proceeding. A copy of the Settlement Agreement is attached.

In essence, the parties have agreed to settle this proceeding on the basis that the Respondent will pay the Complainant \$273,032.40 in return for which the Complainant will release and forever discharge the Respondent, its agents and employees from all claims arising from the circumstances involved in this proceeding. The amount involved is exactly the amount found to be due by the Commission (less interest). In settling the matter the Respondent has also given up the right to appeal from the Commission's decision. The parties submit that "rather than proceeding with an additional trial with its attendant

expenses, the parties have agreed upon a monetary payment . . . in full settlement of this dispute." They further submit that "the settlement reached is fair, adequate and reasonable, and not in contradiction of law or public policy."

It is well settled that courts generally favor settlements, including those coming under the APA provision. Pennsylvania Gas and Water v. Federal Power Commission, 463 F.2d 1242, 1247 (D.C. Cir., 1972).

The Commission, too, has long recognized and applied the law favoring settlements. In Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506, 512 (1978), 18 SRR 1085, 1092, it stated:

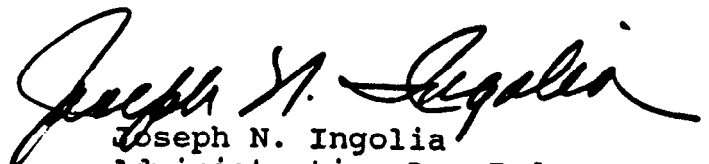
. . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

See also Del Monte Corp. v. Matson Navigation Co., 22 F.M.C. 365 (1979), 19 SRR 1037, 1039; Behring International, Inc. Independent Ocean Freight Forwarder License No. 910 (Initial Decision, March 17, 1981, administratively final June 30, 1981), 20 SRR 1025, 1032-33. See also discussion and cases cited in Delphi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia-New Zealand Conference and Columbia Lines, Inc., _____ F.M.C. _____, 245 SRR 1129 (1988).

In this particular case the settlement is a highly desirable one since it actually represents adoption of the Commission's decision after a full hearing on the issues. The parties obviously believe it is not worthwhile to pursue the option for further trial on the question of reparations afforded them by the Commission and the undersigned believes their conclusion is both wise and pragmatic. Wherefore, it is,

Ordered, that the Settlement Agreement be approved and that its terms are incorporated in this paragraph as if more fully set forth herein. The payment of monies provided for in the settlement shall be made no more than forty-five (45) days from the date of the Commission's final approval of the Settlement Agreement, and it is,

Further Ordered, that on approval of the Settlement Agreement by the Commission this proceeding is dismissed, with prejudice.


Joseph N. Ingolia
Administrative Law Judge

(S E R V E D)
(December 28, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-7

THE SECRETARY OF THE ARMY ON BEHALF OF
THE DEPARTMENT OF DEFENSE

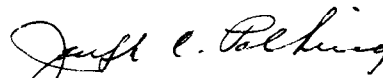
v.

THE PORT OF SEATTLE

NOTICE

On November 23, 1988, the presiding Administrative Law Judge issued a supplemental initial decision on remand which approved a settlement agreement relating to reparations as well as a joint motion by the parties to terminate the proceeding.

Notice is now given that the time within which the Commission could determine to review this decision has expired. No such determination has been made and accordingly, the decision has become administratively final.


Joseph C. Polking
Secretary